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OF THE

American Society of International Law

AT ITS

FIFTEENTH ANNUAL MEETING

HELD AT

WASHINGTON, D. C.

APRIL 27-30, 1921

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FOR THE YEAR 1921–1922.

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CONSTITUTION

OF THE

AMERICAN SOCIETY OF INTERNATIONAL LAW[1]

ARTICLE I

Name

This Society shall be known as the American Society of International Law.

ARTICLE II

Object

The object of this Society is to foster the study of International Law and promote the establishment of international relations on the basis of law and justice. For this purpose it will cooperate with other societies in this and other countries having the same object.

ARTICLE III

Membership

Members may be elected on the nomination of two members in regular standing by vote of the Executive Council under such rules and regulations as the Council may prescribe.

Each member shall pay annual dues of five dollars and shall thereupon become entitled to all the privileges of the Society, including a copy of the publications[2] issued during the year. Upon failure to pay the dues for the period of one year a member may, in the discretion of the Executive Council, be suspended or dropped from the rolls of membership.

Upon payment of one hundred dollars any person otherwise entitled to membership may become a life-member and shall thereupon become entitled to all the privileges of membership during his life.

A limited number of persons not citizens of the United States and not exceeding one in any year, who shall have rendered distinguished service to the cause for which this Society is formed to promote, may be elected to

[1] The history of the origin and organization of the American Society of International Law can be found in the Proceedings of the First Annual Meeting at p. 23. The Constitution was adopted January 12, 1906.

[2] See Amendments, Article II, p. xi.

honorary membership at any meeting of the Society on the recommendation of the Executive Council. Honorary members shall have all the privileges of membership, but shall be exempt from the payment of dues.

Article IV

Officers

The officers of the Society shall consist of a President,[3] nine or more Vice-Presidents, the number to be fixed from time to time by the Executive Council, a Recording Secretary, a Corresponding Secretary, and a Treasurer, who shall be elected annually, and of an Executive Council composed of the President, the Vice-Presidents, *ex officio*, and twenty-four elected members, whose terms of office shall be three years, except that of those elected at the first election, eight shall serve for the period of one year only and eight for the period of two years, and that any one elected to fill a vacancy shall serve only for the unexpired term of the member in whose place he is chosen.

The Recording Secretary, the Corresponding Secretary and the Treasurer shall be elected by the Executive Council from among its members. The other officers of the Society shall be elected by the Society, except as hereinafter provided for the filling of vacancies occurring between elections.

At every annual election candidates for all offices to be filled by the Society at such election shall be placed in nomination by a Nominating Committee of five members of the Society previously appointed by the Executive Council, except that the officers for the first year shall be nominated by a committee of three appointed by the Chairman of the meeting at which this Constitution shall be adopted.

All officers shall be elected by a majority vote of members present and voting.

All officers of the Society shall serve until their successors are chosen.

Article V

Duties of Officers

1. The President shall preside at all meetings of the Society and of the Executive Council and shall perform such other duties as the Council may assign to him. In the absence of the President at any meeting of the Society his duties shall devolve upon one of the Vice-Presidents to be designated by the Executive Council.

2. The Secretaries shall keep the records and conduct the correspondence of the Society and of the Executive Council and shall perform such other duties as the Council may assign to them.

3. The Treasurer shall receive and have the custody of the funds of

[3] See Amendments, Article I, p. xi.

the Society and shall disburse the same subject to the rules and under the direction of the Executive Council. The fiscal year shall begin on the first day of January.

4. The Executive Council shall have charge of the general interests of the Society, shall call regular and special meetings of the Society and arrange the programmes therefor, shall appropriate money, shall appoint from among its members an Executive Committee and other committees and their chairmen, with appropriate powers, and shall have full power to issue or arrange for the issue of a periodical or other publications, and in general possess the governing power in the Society, except as otherwise specifically provided in this Constitution. The Executive Council shall have the power to fill vacancies in its membership occasioned by death, resignation, failure to elect, or other cause, such appointees to hold office until the next annual election.

Nine members shall constitute a quorum of the Executive Council, and a majority vote of those in attendance shall control its decisions.

5. The Executive Committee shall have full power to act for the Executive Council when the Executive Council is not in session.

6. The Executive Council shall elect a Chairman, who shall preside at its meetings in the absence of the President, and who shall also be Chairman of the Executive Committee.

Article VI

Meetings

The Society shall meet annually at a time and place to be determined by the Executive Council for the election of officers and the transaction of such other business as the Council may determine.

Special meetings may be held at any time and place on the call of the Executive Council or at the written request of thirty members on the call of the Secretary. At least ten days' notice of such special meeting shall be given to each member of the Society by mail, specifying the object of the meeting, and no other business shall be considered at such meeting.

Twenty-five members shall constitute a quorum at all regular and special meetings of the Society and a majority vote of those present and voting shall control its decisions.

Article VII

Resolutions

All resolutions which shall be offered at any meeting of the Society shall, in the discretion of the presiding officer, or on the demand of three members, be referred to the appropriate committee or the Council, and no vote shall be taken until a report shall have been made thereon.

Article VIII

Amendments

This Constitution may be amended at any annual or special meeting of the Society by a majority vote of the members present and voting. But all amendments to be proposed at any meeting shall first be referred to the Executive Council for consideration and shall be submitted to the members of the Society at least ten days before such meeting.

Amendments

Article I[4]

Article IV is hereby amended by inserting after the words "The officers of the Society shall consist of a President," the words "an Honorary President."

Article II[5]

Article III is hereby amended by striking out the word "publications" in the third line of paragraph two, and inserting in lieu thereof the words "American Journal of International Law."

[4] This amendment was adopted at the business meeting held April 24, 1909.

[5] This amendment was adopted at the business meeting held April 30, 1921.

FIFTEENTH ANNUAL MEETING

OF THE

AMERICAN SOCIETY OF INTERNATIONAL LAW

SHOREHAM HOTEL, WASHINGTON, D. C.

APRIL 27–30, 1921, AT 8.30 O'CLOCK P. M.

FIRST SESSION

Wednesday, April 27, 1921, 8.30 o'clock p. m.

OPENING ADDRESS

BY ELIHU ROOT

President of the Society

PRESIDENT ROOT. Members of the Society, Ladies and Gentlemen: This is the Fifteenth Annual Meeting of this Society, although for three years past it has not been deemed wise to bring the general membership together for the purpose of public discussion of international questions. During the years 1918, 1919 and 1920, international questions became so interwoven with political strife, and there was so much heated feeling, that it seemed to the Executive Council of the Society that there would be a strong probability of running into the discussion of mooted political questions which would be injurious to the Society, and that probably our discussions would be without the authority which such discussions ought to have and do have when conducted impartially and without feeling.

Happily, we are now for the moment in position where we can take up our ordinary course of dealing with questions of international law of great importance.

The American Society of International Law may appropriately renew its discussions of the subject to which it is devoted, by a review of the effects of the World War both as to the law itself and as to the international relations under which the law is to be applied.

It is obvious that we cannot go on assuming that the laws and customs of war on land and at sea, the rules which regulate the rights and duties of neutral Powers and persons in case of war, retain the authority which we supposed them to possess in the month of July, 1914. These rules imposed their obligation upon all parties to the great conflict, and, when

violated by one party, they could not reasonably be deemed to restrain the other belligerents. So, the world went on for several years without much reference to them; and the question now is: How far do they exist? In many ways the conditions which gave rise to these rules have been materially changed. The new modes of conducting war under which practically entire peoples are mobilized either for combat or supply have apparently destroyed the distinction between enemy forces and non-combatant citizens, so that the differences which underlie the law of contraband disappear. The whole people would seem to be an enemy force, and all goods destined for their use would appear to be contraband. The historic Declaration of Paris that "the neutral flag covers enemy goods with the exception of contraband of war" and that "neutral goods with the exception of contraband of war are not liable to capture under the enemy's flag" would seem to have been swallowed by the exception, and the doctrine that "free ships make free goods" and that "blockades in order to be binding must be effective" appear to have become idle phrases. The submarine, the Zeppelin and the airplane, wireless telegraphy, the newly achieved destructive power of high explosives and of poisonous gases, have created conditions affecting both belligerents and neutrals not contemplated when the old rules were established, and in many respects the old rules are not adapted to deal with the new conditions.

More important still is a fact which threatens the foundation of all international law. The doctrine of *kriegsraison* has not been destroyed. It was asserted by Bethman Hollweg at the beginning of the war when he sought to justify the plain and acknowledged violation of international law in the invasion of Belgium upon the ground of military necessity. The doctrine practically is that if a belligerent deems it necessary for the success of its military operations to violate a rule of international law, the violation is permissible. As the belligerent is to be the sole judge of the necessity, the doctrine really is that a belligerent may violate the law or repudiate it or ignore it whenever that is deemed to be for its military advantage. The alleged necessity in the case of the German invasion of Belgium was simply that Belgium was deemed to be the most advantageous avenue through which to attack France. Of course, if that doctrine is to be maintained, there is no more international law, for the doctrine cannot be confined to the laws specifically relating to war on land and sea. With a nation at liberty to declare war, there are few rules of peaceful intercourse, the violation of which may not be alleged to have some possible bearing upon a military advantage, and a law which may rightfully be set aside by those whom it is intended to restrain is no law at all.

The doctrine has not been abandoned. It was formally and authoritatively declared by the German Government and acted upon throughout the war. We can find no ground to justify the conclusion that a plainly unrepentant Germany does not still maintain the soundness of the doctrine

as a part of its historic justification, nor has there been any renunciation by the allies of Germany. We must, therefore, face the fact that the law which during the course of three centuries had become apparently firmly established upon the universal acceptance and consent of all the members of the community of civilized nations is shaken to its foundation by the repudiation of its moral obligation on the part of the four Central Powers—Germany, Austria-Hungary, Turkey, and Bulgaria, which at the outbreak of the war had over 144,000,000 of inhabitants.

Few more futile public performances can be found in the history of international intercourse than the long diplomatic discussions which accompanied the earlier years of the war between neutral nations and Germany, about the rules of international law and their application to the conduct of Germany's military and naval proceedings, while Germany had already publicly declared that she would not deem herself bound by any rules she found to be disadvantageous to herself. The same will be true in the future if the same condition exists. It will be impossible to maintain the restraint upon national conduct afforded by the rules of international law so long as so great a part of the civilized world asserts the right to disregard those rules whenever it sees fit. Either the doctrine of *kriegsraison* must be abandoned definitely and finally, or there is an end of international law, and in its place will be left a world without law, in which alliances of some nations to the extent of their power enforce their ideas of suitable conduct upon other nations.

Another threatening obstacle to international law exists in the rapid development of internationalism. This is presented by the avowed purposes of the Third Internationale aiming at the destruction of national governments and the universal empire of the proletariat; by the fact that the brutal and cruel despotism of Lenin and his associated group has been able to maintain its ascendency over the vast territory and population of Russia, calling itself a dictatorship of the proletariat but making itself a dictatorship over the proletariat as well as all other classes, and ruling in the name of a world revolution for the accomplishment of the purposes of the Third Internationale. It is presented also by the universal propaganda carried on with almost religious fervor in all countries and seriously affecting the leadership of labor in many countries. That propaganda, exceedingly subtle and ingenious, throughout the world has toppled over the wits of parlor Socialists from their insecure foundations of education superior to their intelligence, and is making them the unconscious agents of promoting political principles which they would abhor if they understood them and in aiding sinister projects for profit in which they personally have no part. The organization of the civilized world in nations is confronted since the war with a vigorous and to some degree prevailing assertion that a much better organization would be that of government by class existing in all nations and superior to all.

International law, of course, is based upon the existence of nations. There is no common ground upon which one can discuss the obligations of international law with the Third Internationale, and just so far as the ideas of Lenin and Trotsky influence the people of a civilized country just so far the government of that country is weakened in the performance of its international obligations.

The existence of nations is not an accident of locality or of language or of race. It is one phase of the struggle of mankind for liberty. The independence of nations is an assertion of the rights of different groups of men having in the main different customs, traditions, habits of thought and action, ideas of propriety and of right, to have local self-government. This is true whatever the form of government; whether it be a monarchy or an aristocracy permitted by the people of the country or a republic in which rulers are elected by the people, the distinction is the same between government in accordance with the people's own conceptions of right and propriety and government by an alien force having different and incongruous conceptions. There are few more injurious influences in international affairs than the inability of the people of one country to understand or to realize the differences between themselves and the people of other countries in fundamental and often unexpressed preconceptions. These differences affect the understanding in the different countries of every act done and every word used. They are not matters of reason to be solved intellectually like a problem of Euclid. They are the results of long ages of tradition, modes and habits of thought, inherited assumptions regarding the conduct of life. One race of men take off their shoes and keep on their hats, another race take off their hats and keep on their shoes under similar conditions to express similar sentiments of respect. To the people of one country polyandry is the natural social organization, to the people of another polygamy, and to the people of others monogamy is natural and appropriate. The people of some countries consider that justice is best attained by applying a system of excluding evidence according to rigid rules of relevancy and competency, while the people of other equally civilized countries consider that the same result may be best attained by admitting in evidence anything that anybody chooses to say on the subject. None of these differences is the result of the working out of problems by pure reason. They come from the fact that peoples of different countries and of different races do not think alike and can not think alike, because their intellectual processes are the resultants of different traditional conceptions combined with the apparent logical premises of each problem.

The most grinding, possible tyranny is to be found in the intimate control of a people by other races or rulers who do not understand the people whom they rule. The vice of tyranny is so widespread, the tendency to tyrannize over others is so universal, especially among those who think themselves better than others, that only the highest intelligence

creates exceptions to the rule of oppression in alien control. The declaration of the independence of nations, large and small, is an assertion of the right to be free from the oppression of alien control. Internationalism would fasten that oppression upon the world without recourse.

The fundamental ideas of international law are, first, that each nation has a right to live according to its own conceptions of life; second, that each national right is subject to the equal identical right of every other nation. International law is the application of these principles through accepted rules of national action adapted to govern the conduct of nations toward each other in the contacts of modern civilization. Internationalism, by destroying the authority and responsibility of nations and the law which is designed to control their conduct toward each other, would destroy the most necessary bulwark of human liberty, the chief protection of the weak against the physical force of the strong, and substitute the universal control which the nature of men will make an inevitable tyranny.

The long, slow process of civilization with its peaceful attrition between individuals and between local and tribal groups tends towards the steady enlargement of nations through the reconciliation of ideas and the adoption of common standards, making it easy for different groups to live together under the same government. Every great country shows the results of this process. Burgundy, Provence and Brittany, Wessex, Sussex, and Northumbria, Wales, England and Scotland, Piedmont and Naples have come to live peaceably together under governments in which each has a voice and in which each is understood. But that process can not be forced any more than the growth of a tree can be forced. It can be promoted as the growth of a tree can be promoted. The parliament of man may come just as the parliaments of Britain and France and Italy have come, but it must be by growth and not by force nor by the false pretence of agreement where there is no real agreement, nor by international majorities overbearing minority nations though majority votes.

The great force of Russia which aims to impose internationalism upon the world, therefore, halts the development of international law, the very foundations of which the existing government of Russia now repudiates. As the basis of international law is universal acceptance, either Russia must be excluded from the category of civilized nations or the law must wait upon the downfall of the present régime in Russia. In the meantime, every act which tends to support that régime, whether for sentiment or for trade, is a hindrance to the restoration of law and the rule of international justice.

Under these circumstances, how are we to take up the task of promoting the development of the Law of Nations? The task cannot be abandoned. The process which owes its impulse towards systematic development to Grotius and the horrors of the Thirty Years' War cannot be abandoned. Never before was the need so great. The multitudes of cit-

izens who now control the national governments of modern democracies and direct international policies can not safely follow the passion of the moment or the idiosyncracy of the individual public officer in their international affairs, without accepted principles and rules of action, without declared standards of conduct, without definition of rights, without prescription of duties too clear to be ignored. Otherwise the world reverts to chaos and savagery.

To determine how this Society and its members may be effective in efforts to promote the development and authority of international law, some further examination of the existing international situation will be useful.

The armistice of November 11, 1918, left for the successful Allied Powers two quite distinct and in some respects incongruous tasks. The first task was to decide upon the terms of peace and to require compliance with those terms. That was a matter of power, of force. It was the imposition of the will of the conquerors upon the conquered. Only the belligerent nations were concerned in it. It was a part of the war. Disarmament, reparation, disposition of conquered colonies, transfers of territory, were to be dictated as alternatives to further military punishment by the successful armies and navies. It was to be affected by the principles of reward for assistance in winning the war, of penalty for offences against civilization in beginning and carrying on the war and by treaties between the belligerents.

The second task in necessary sequence was to give effect to the universal desire of the civilized world by bringing all civilized nations into agreement for the future preservation of peace. That was a matter, not of force, but of reason, humanity, universal instinct of self-preservation. It must be voluntary, not compulsory. It was the concern of all neutral nations equally with all belligerent nations. It presupposed a world at peace in which peace, already attained, was to be preserved. It was to follow, not to be a part of, the compulsions of conquest.

The Versailles Conference undertook to include both of these separate, distinct and incongruous processes in the same treaty. They framed a League of Nations for the future, they invited all neutrals to join and at the same time and in the same instrument they undertook to impose penalties to which they required the defeated belligerents to submit. The defeated belligerents were not admitted to the League and had nothing to say about it, while the neutral members of the League naturally had no right or authority respecting the terms of peace imposed by the treaty. The two processes were tied together, however, by provisions making the League of Nations the agent of the conquerors to see to the execution of the terms imposed upon the other defeated nations. Thus certain powers were vested in the League including neutrals, regarding the administration of occupied territory, plebiscites, scrutiny of government under mandates. These

functions plainly were to be in exercise of derivative not original authority of the League, which became a mere agent of the belligerents for those purposes. Spain, Holland, Norway, for example, and any organization which represents them can have no authority regarding a plebiscite in Silesia or the government of Danzig, except within the limits of a specific agency created by the nations which had a right won by conquest or created by treaty between such nations and Germany.

Another peculiarity of the treaty was that, although it contemplated the participation of all the belligerents, it was expressly made separable, by the provision that it should take effect when ratified by any three of the principal Powers. Accordingly, when the other principal Powers ratified the treaty and the United States refused to do so, the terms of peace became binding between Germany and the ratifying Powers, although not between Germany and the United States. And the League of Nations, no longer a mere project, came into being and still exists, uniting for specified purposes, substantially all the civilized countries except the United States, Germany, Russia, Austria-Hungary, and Turkey.

The natural tendency of these arrangements and the discussion and controversy which they engendered was towards great delay and confusion. The imposition of terms of peace was a matter calling for prompt decision and compliance while the conquering armies were in being and able to compel compliance. Under the distractions and discussions incident to the formation of a League for future peace, this vital process of closing the war dragged along until the Western armies had mainly disappeared; and many of the issues of the war have passed into a new and prolonged stage of discussion.

In the meantime, the Supreme Council of the belligerents, in which the United States continued entitled to a place which she ceased to fill, has held the center of the international stage trying to bring about the state of peace which the League of Nations was formed to preserve, and at the same time the League has been struggling with its special agency under the treaty without ever having been put by its principals in the position of recognized authority; and the organization for future peace has remained incomplete in the face of continual actual war involving a majority of the people of Europe and the Near East.

In considering our course as students, lawyers, American citizens, united by common interest in the Law of Nations, I think we must assume that the conditions which I have described are temporary; that before very long the immediate issues of the war will be settled for the time being and peace will be restored; that republican Germany and her associates will abandon the arrogant assertion of the *kriegsraison;* that the brutal and cruel despotism which now oppresses the people of Russia will meet the fate which awaits the violation of economic laws and, failing to be rescued by

those friends who are coming to its assistance in this and other countries, will fall, and the people of Russia will come to their own.

When these results have been reached, there will remain the hindrances of differing forms and methods favored by the nations within and the nations without the existing League. But the idea that by agreeing at this time to a formula the nations can forever after be united in preventing war by making war seems practically to have been abandoned; and the remaining differences are not of substance and ought not to prevent the general desire of the civilized world from giving permanent form to institutions to prevent further war. In the long run, from the standpoint of the international lawyer, it does not much matter whether the substance of such institutions is reached by amending an existing agreement or by making a new agreement.

The necessary things are that there shall be institutions adapted to make effective the general civilized public opinion in favor of peace, and that these institutions shall be developed naturally from the customs, the habits of thought and action, and the standards of conduct in which civilized nations agree, and that they shall be of such a nature that the habit of recourse to them will have an educational effect and be a means of growth in justice and humanity.

The Covenant of the League, under which so many nations are now included, commits its members fully to these fundamentals, and, while it undertakes to go farther and do too much, the evident tendency of its members is to reduce this excess by interpretation and amendment and bring it down to the character of real representation of the common customs and common opinions of civilized peoples in favor of peace.

On the other hand, the United States is certain to be ready to join in some form, in seeking the same result by these same essential methods. That will follow necessarily from the traditional policy of our country and the responsible declarations of our government in both the legislative and the executive branches.

Considering this field of preventive provisions as separate and distinct from the temporary exigencies of compulsory war settlements, if we examine both the League agreement and the declared policy of the United States for information as to common purposes, we shall find several different kinds of united action upon which there is practically agreement in principle, with difference only in degree or as to specific means.

We may pass over, as least important, although extremely useful, provisions for international cooperation in administrative services to facilitate trade and intercourse, or to apply regulations by common consent in matters of common interest. The International Postal Union, the control of wireless telegraphy, the ice patrol of the North Atlantic for the safety of the ships of all nations, are examples of this kind of cooperation. The labor provisions of the Treaty of Versailles come under the same head, although

they were put into the treaty without the discussion and consideration necessary to ascertain whether they ought to be adopted or whether they met a general demand or were adapted to world conditions. Much of the time of the League organization has been devoted to matters of this character, which are really local, affecting particular groups of countries and which would be arranged, naturally and probably better, between the countries concerned, without burdening or involving the countries not concerned.

Most important for dealing with immediate danger to international peace is a system of international conferences upon questions of international policy. This is a natural growth from experience. The Algeciras Conference is a type. The Conference in London, which limited the effect of the Balkan wars, is another. It is a general belief that if Sir Edward Grey had secured the conference he sought in July, 1914, the war would have been averted. Whether it be by dispelling misunderstandings, allaying fears, soothing irritation, or by the repressive effect of general adverse opinion, a formal general conference of the principal nations ordinarily leads to a situation in which it is extremely difficult for any nation to begin war.

The weakness of the practice hitherto has been in the fact that no one had a right to insist upon a conference; no one was under obligation to attend a conference. The step in advance plainly indicated as the natural development of this most useful practice into a systematic institution, is to establish an administrative agency whose duty it shall be to call such a conference in time of threatened danger on suitable request, and to place all nations under obligation to attend the conference when called. Upon the substance of this there is no disagreement. The Council of the League does this and something more, and the difference is over the something more. The Council of the League is a perpetual, permanent conference, as distinguished from conferences *ad hoc*, to be called automatically whenever grave cause arises. No one seems to question that in one way or another there should be obligatory conferences.

Such conferences, however, deal with policy in particular exigencies, and they proceed upon motives of expediency. They are not steps in the development of the rule of right among nations. In that direction also, however, we find elements of general agreement.

The Covenant of the League of Nations in its preamble states one of its objects to be "in order to promote international cooperation and to achieve international peace and security . . . by the firm establishment of the understandings of international law as the actual rule of conduct among governments"; and in the 14th article it provides: "The Council shall formulate and submit to the members of the League for adoption plans for the establishment of a permanent court of international justice."

The American Congress in a statute enacted August 29, 1916, expressed the American view in the most solemn form. The statute says:

> It is hereby declared to be the policy of the United States to adjust and settle its international disputes through mediation or arbitration, to the end that war may be honorably avoided. . . . In view of the premises, the President is authorized and requested to invite, at an appropriate time, not later than the close of the war in Europe, all the great Governments of the world to send representatives to a conference which shall be charged with the duty of formulating a plan for a court of arbitration or other tribunal, to which disputed questions between nations shall be referred for adjudication and peaceful settlement.

The latest message of the President of the United States to Congress on the 12th of the present month, said:

> The American aspiration, indeed the world aspiration, was an association of nations based upon the application of justice and right, binding us in conference and cooperation for the prevention of war and pointing the way to a higher civilization and international fraternity in which all the world might share. . . . In the national referendum to which I have adverted, we pledged our efforts towards such an association, and the pledge will be faithfully kept.

The pledge to which the President plainly referred in the paragraph just quoted, was contained in the Republican Platform, in these words:

> The Republican Party stands for agreement among the nations to preserve the peace of the world. We believe that such an international association must be based upon international justice, and must provide methods which shall maintain the rule of public right by the development of law and the decision of impartial courts, and which shall secure instant and general international conference whenever peace shall be threatened by political action, so that the nations pledged to do and insist upon what is just and fair may exercise their influence and power for the prevention of war.

While this pledge was in the platform of one party, it was not, in fact, the subject of party controversy, and the enormous majority of over seven million votes given to the candidate standing by that platform justifies the assertion that these words state the true attitude of the American people, as that attitude is now certified in the passage which I have quoted from the President's message to Congress.

It is apparent that the attitude of the League and the attitude of America toward this subject do not differ in substance, however much they may differ as to the specific modes of effectuating the common purpose.

The duty imposed upon the Council of the League, "to formulate and submit plans for the establishment of a permanent court of international justice," has been performed, and a convention establishing such a court has been adopted by the League and has already been ratified by many of its members. It provides for a permanent court of judges elected for fixed periods, paid fixed salaries, engaging in no other occupation, and bound to

proceed under an oath which imposes upon them judicial obligation as distinguished from a sense of diplomatic obligation. To this court all nations may repair for the adjudication of their differences.

So much for the nations in the League. It is also true that this court is in substance, in everything essential to its character and function, the same court which under Mr. Roosevelt's administration was urged by the United States upon the Second Conference at The Hague in 1907, and which, at the instance of the United States, was provided for in subsequent treaties between the United States and the principal European Powers, negotiated under Mr. Knox as Secretary of State in Mr. Taft's administration, but not finally consummated when the war intervened.

Here plainly there is agreement in substance, and the difficulties are formal.

The technical commission which in the summer of 1920 drafted the plan for a permanent court that has been adopted by the League, accompanied the plan by a unanimous recommendation as follows:

> The Advisory Committee of Jurists, assembled at The Hague to draft a plan for a Permanent Court of International Justice,
>
> Convinced that the security of states and the well-being of peoples urgently require the extension of the empire of law and the development of all international agencies for the administration of justice,
>
> Recommends:
>
> I. That a new conference of the nations in continuation of the first two conferences at The Hague be held as soon as practicable for the following purposes:
>
> 1. To restate the established rules of international law, especially, and in the first instance, in the fields affected by the events of the recent war.
>
> 2. To formulate and agree upon the amendments and additions, if any, to the rules of international law shown to be necessary or useful by the events of the war and the changes in the conditions of international life and intercourse which have followed the war.
>
> 3. To endeavor to reconcile divergent views and secure general agreement upon the rules which have been in dispute heretofore.
>
> 4. To consider the subjects not now adequately regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted.
>
> II. That the Institute of International Law, the American Institute of International Law, the Union Juridique Internationale, the International Law Association, and the Iberian Institute of Comparative Law be invited to prepare with such conference or collaboration *inter sese* as they may deem useful, projects for the work of the Conference to be submitted beforehand to the several Governments and laid before the Conference for its consideration and such action as it may find suitable.
>
> III. That the Conference be named Conference for the Advancement of International Law.
>
> IV. That this conference be followed by further successive conferences at stated intervals to continue the work left unfinished.

Plainly, these recommendations can not receive effect now, nor until the present emergencies of an unsettled war have been disposed of. But when the time comes, they will point the way to the performance of the object of the League "for the firm establishment of the understandings of international law," and the identical purpose of the people of the United States, so often declared by their representatives.

It is to be observed that these two—the establishment of a permanent court and the restoration of the authority of international law—are correlative parts of the same world policy, upon the substance of which the civilized nations are in agreement.

There can be no real court without law to control its judges, and there can be no effective law without institutions for its application to concrete cases. This is the traditional policy of the United States—to establish and extend the law declaring the rules of right conduct accepted by the common judgment of civilization and to substitute in international controversies upon conflicting claims of right impartial judgment under the law in the place of war.

The existing situation presents difficulties and embarrassments in arriving at a common understanding regarding the precise modes in which this general world policy shall receive effect; but I, for one, am not willing to assume that the patience and good sense of the diplomacy of the world, including our own country, will be unequal to the task of so disposing of the formal difficulties as to achieve the great object upon which all are agreed.

It is further to be observed that conference upon matters of policy, either permanent or occasional, on the one hand, and the establishment of law and judicial disposal of questions of right, on the other hand, are not alternative and opposing methods. They are mutually supplemental parts of one and the same scheme to prevent war. Both are methods of bringing the public opinion of the world to bear upon the settlement of controversies. Neither covers the field without the other. Never before has there been such evidence of the power of public opinion as has been afforded by the vast propaganda through which the contending nations in the great war have tried their cases at the bar of public judgment of the world, and have sought to commend their conduct to the peoples of other nations.

The idea that any formula can be devised under the working of which the world can be made peaceable by compulsion, is manifestly in course of abandonment. The public opinion of mankind is so mighty a force, that it is competent to control the conduct of nations as the public opinion of the community controls the conduct of individuals. But it must be an intelligent, informed and disciplined opinion. The exit of autocracies leaves the direction of foreign relations under the ultimate control of multitudinous, ill-informed and untrained democracies. In place of dynastic ambitions, the danger of war is now to be found in popular misunderstandings and resentments.

How are these vast democracies to be justly informed as to the rights and wrongs of controversies, and the fairness of policies? It seldom happens that the great multitude of citizens can argue out from first principles the complicated and difficult questions of right and wrong involved in international relations. It seldom happens that the subject is not obscured by misinformation and misleading suggestion, and by appeals to passion rather than to judgment. The only mode of meeting this great and vital need, dictated by reason and approved by experience, is the establishment of institutions through which, when strife is not flagrant, the deliberate and unbiased opinion of mankind may declare and agree upon the rules of conduct which we call law, by which in times of excitement judgment may be guided, and by which the peoples may be informed of the limits of their rights and the demands of their duties; and by the establishment of institutions through which disputed facts may be determined and false appearance and misinformation may be stripped away and the truth be made known to the good and peaceful peoples of the world by the judgment of impartial and respected tribunals. In such institutions rests the possibility of growth of development for civilization. Through them may be established by usage the habit of respecting law. They may create standards of conduct under which the thoughts of peoples in controversy will turn habitually to the demonstration of the justice of their position by proof and reason, rather than by threats of violence, so that the time will come when a nation will know that it is discredited by the refusal to maintain the justness of its cause by the procedure of justice.

This is the work of international law, applied by an international court. The process will be slow, but all advance of civilization is slow. Not what ultimate object we can attain in our short lives, but what tendencies towards higher standards of conduct in the world we can aid during our generation, is the test that determines our duty of service. The conditions which will hinder and delay effective action for the re-establishment of law are many and serious, but we must prepare. When the time for action comes, it must find the results of study, discussion and matured thought ready, as material for authoritative judgment by the nations, and, meantime, the voice of the least of us may be of some avail, urging that force be repressed and expediency be guided by the public opinion of the world made effective by declared and accepted rules of public right applied by competent and impartial international tribunals.

PRESIDENT ROOT. It is my pleasure to introduce to you as the first regular speaker of the meeting of the Society our honored and welcome guest, the distinguished statesman of Brazil, former Minister of Brazil to Belgium, Japan, Sweden and Venezuela, Honorable Manoel de Oliveira Lima, who will speak to us on the subject of "The reconstruction of international law."

THE RECONSTRUCTION OF INTERNATIONAL LAW

ADDRESS BY MANOEL DE OLIVEIRA LIMA

Former Minister of Brazil to Belgium, Japan, Sweden and Venezuela

Mr. Chairman and gentlemen of the American Society of International Law: I do not know if I may be allowed to begin this address with a story, or rather, an unimportant personal incident connected anyhow with our subject. Do not suppose that I imagine, as some do abroad, who have but a superficial notion of things American, and, crossing the ocean, have chiefly been guests at banquets, that speeches in this country have to be listened to with pleasure, to be mostly composed of stories. In this sense everybody is, in fact, more or less a story-teller, but we meet with another kind of oratory which is interwoven with principles, and longs for lofty ideals. That is the oratory which, coupled with his own magnetic gifts, rendered, for instance, Daniel Webster famous forever.

What I wish to relate took place in 1915 when I came over as visiting professor to Harvard, and availed myself of the first opportunity to go to a post office in Boston in order to send a small parcel to a friend in Central Europe,—communications from London being of course suspended. The agent told me that I would have to send it at my own risk, as mails by all steamers were subject to search and seizure. As I showed surprise at this assertion and mentioned neutrality—the argument that naturally came to my lips—the good agent, who must have been a law student, or at least the neighborhood of Cambridge had made of him a learned man, answered with a sad smile: "International Law is dead, my dear sir." I could only reply: "Let us hope that it will revive some day."

Such a day has fortunately arrived, and it behooves America, for every reason, to take the initiative in such a revival. For every reason, I said, and the chief one is that in peace and war, during the recent historical crisis, America—I am speaking of the whole America—never lost sight entirely of justice and right.

One of the great lessons she derived from the appalling struggle which seems to have caused civilization to forsake Europe forever, is that culture is a vain word when not associated with the cult of law.

We all feel in this hemisphere in the same way, and we are truly Pan-American in this, as in other senses. It is consequently most happy and most appropriate that the reopening of the labors of the American Society of International Law be presided over, as its meetings previously were, by the most distinguished Pan-American of the United States—the Honorable Elihu Root, who left in South America an everlasting recollection for his sincerity of purpose, his diplomatic ability and the broad and deep meaning of his utterances.

His name is connected with all practical recent suggestions for the gathering of peoples under the auspices of law and for the judicial solution of all international controversies. International relations can not prosper without the existence of a supreme ethical rule which every nation must obey and which none may violate without incurring an effective responsibility for her mischief. The construction of world harmony, which is the principal aim of human activity, has therefore to rest upon the codification of the maxims of the law of nations.

Jurists and statesmen have long considered this work indispensable, but violence—and violence is unfortunately more frequently employed than gentleness—has hindered its realization other than in a theoretical form. So far as America is regarded, the task was proposed at the Second Pan-American Conference in Mexico by the Brazilian delegate, Jose Hygino Duarte Pereira—a mind devoted exclusively to the triumph of law—and it received a beginning of execution after the Third Pan-American Conference in Rio de Janeiro, where also the committee of jurisconsults met for this purpose.

My country, as you know, has remained closely bound to the scheme which events have since then made pressing, and I attribute to this circumstance the honor bestowed upon me at this moment, more than to the fact that I represent near the Institute the Brazilian Society of International Law affiliated to it, which has equally resumed its labors under the leadership of an internationalist worthy of all deference, the retired Justice Amaro Cavalcanti, conspicuous in administration, diplomacy and practice of law.

I prize so much more the invitation to speak at this meeting because it has been tendered to me by Dr. James Brown Scott, whom we all consider one of the best workers in this most frutiful field of international conciliation, to which he has devoted his entire intelligent and persuasive activity.

Brazil is not, let me add, the only Ibero-American country to render homage to the ideal of justice as well as to its positiveness, and to be guided in her development by the sentiment of public law. We are, all of us of Spanish or Portuguese descent, the spiritual offspring of Rome; we may sometimes be inclined to a little chicanery and sophistry, but we generally show ourselves in great emergencies ready to sacrifice interests to right, and this is the test of genuine civilization.

We hold for such reason a claim to be amongst the principal artisans of the reconstruction of the crumbled edifice which had been put up at the cost of so many endeavors, so many deceptions, so many hopes and so much ambition. Another will be raised, even of a nobler architecture. We must try to reduce to a minimum the possibilities of war and, if such a calamity has to occur again, to minimize the sufferings of the populations over which fall unduly the burdens and agonies which governments ought carefully to avoid and must be morally compelled to do.

A nobler task can not exist on earth than the one which befalls our soci-

eties. It is said and proven that previous wars and even remote wars were much more merciful than the last World War, deprived, as this one has been, of all spirit of chivalry and most reluctant to admit the efficiency of and to comply with the principles of altruism, or at least of that compassion which everybody believed religion had profoundly impressed on human nature.

We could say formerly that Latin-America possessed a European soul, in the sense that it used to be directed by European thought and that European motives were paramount in its essence, much more so than in this country which had at her disposal greater facilities and enjoyed better conditions to mould her own soul. Recent events have, however, turned that into a fallacy, and the New World is becoming conscious of feeling differently, with more equanimity, more tolerance, more charity, and we may add, more common sense than the old countries from which those new nationalities sprang a century or a little over a century ago.

The American soul is not free from imperfections, but since it tries to be governed by law, it chooses to depend on morality. Utilitarian preoccupations find room, of course, in our collective mind, but they are toned down by intellectual features. We reckon in our communities men like Clovis Bevilacqua, of Brazil, whose life has been a continuous plea for civil rights, and like Zeballos, of the Argentine Republic, who has raised a monument of his own to justice exalted by freedom.

The reopening of the annual meetings of this Society, surely destined to be the best instrument for the reconstruction of international law and the further application of its theories to concrete cases, occurs, through a coincidence, between two commemorations: the unveiling of Bolivar's statue in New York, and the celebration of the first centenary of Napoleon's death.

In these two Homeric figures you may already note the European and the American soul; I mean the difference between the influence under which each of them acts. Napoleon was a military genius and also a genius for social organization; but his materialistic ideal dragged him to ruin, being like any other of the same nature—egotistical and narrow. He wanted his country to be the first, better say, the only one; a new Rome with a much less liberal government of her provinces.

Bolivar, though a warrior, was not a conqueror. He, on the contrary, was a liberator, and his conception was rather of an international character. He looked for the hegemony of Colombia, but a peaceful hegemony exercised through constitutional progress and the action of her prestige on the Pan-American league that he sought to establish at Panama, the geographical importance of which he fully realized as a political precursor and heralded it for the benefit of mankind and the greater glory of America.

Our continent has received from the World War another great lesson which all mankind ought to have learned if passion had not blindfolded a good part of it, the portion precisely that we were accustomed to consider

the representative of best achievements in the realm of intelligence. Such lesson is that war in itself does not solve either national or international problems; it only gives birth to new wars of revenge and retaliation. Europe seems today, after the so-called peace was imposed over there, more divided than during the fighting, which at least preserved an ephemeral solidarity in the fields of battle in face of the diversity and opposition of conflicting interests.

So long as militarism, which is the twin brother of imperialism, remains the foundation of political power, an association of nations deserving such a name can not thrive and be converted into a beneficial reality. That spirit of human fraternity, which is the only one capable of bringing peoples together under the authority of a doctrine common to all civilized nations, is incompatible with contests of nationalities and races. So long as the transgression of such a doctrine, which must stand as a gospel, is blamed by some and condoned by others, and so long as this transgression may be renewed without calling for repression, no positive improvement will be attained in a condition of things singularly unstable.

It would even be difficult, after the present anarchy, to restore the balance which previously existed between a few identical aspirations of groups separated by centuries of hostility and traditions of hatred, without proceeding first to a remodeling of the law of nations and the integral development of institutions known to the classical ages, but only become familiar in modern times.

Have we not in America put an end through arbitration—voluntary, not compulsory—to many troublesome and irritating differences, which threatened the good relations between countries of this hemisphere? If the rule has permitted exceptions, the repetition of these would, I firmly believe, be impossible nowadays. The sword, we may say, has practically ceased to assume the rôle of international arbiter of our destinies.

Brazil has, thanks to that juridical resource, adjusted all her immense boundaries and even entirely abided by an award which was far from impartial and had been dictated by political conveniences, the expression of a national egotism. The Argentine Republic and Chile reached equally through arbitration a friendly agreement on their old territorial quarrels and both countries are so convinced that this agreement is to be everlasting, that they raised the statue of Christ, the Divine Peace-Maker, at the boundary line of the snowy summits of the Andes. Christian feeling inspired their understanding, and will accordingly mould their future relations. European civilization was wrong in neglecting the God of Justice and Mercy to foster the low passions of envy and greed.

In my own country—let me remind you with pride—no war was ever waged for territorial conquest, although once deprived of our natural southern boundary. The long war against Paraguay was called imperialistic, not only imperial, although we were driven into it more than we were willing

to undertake it. Yet Brazil did not extend one inch the previous colonial domain and the payment of the war indemnity was never exacted. That indemnity was stipulated in the treaty celebrated fifty years ago under the form of a certain amount of money—at that time milk cows, for instance, did not figure in peace treaties, which in this way acquire an Assyrian or Babylonian flavor,—but has never been claimed by the victor and is practically canceled. Nobody in Brazil would ever think of insisting on it and not a few ask for its official suppression.

Now that the European league of nations has been discarded by the unmistakable and overwhelming vote of the American people, and that the United States are able through their independent action to assume the moral guidance of the world, in the same way as circumstances have brought within their reach the political, social, financial and economical leadership, it seems as if the occasion has arisen to carry into execution old ideas which belong to the American spiritual patrimony.

The freedom of the seas, for instance, which might well have been the best result, not to say, perhaps, the only good one of the World War, was ignored at the conference of Versailles; yet, historically and politically, it is so intimately associated with the United States' development, that this country went once to war for the sake of it, and later on, if consideration had been accorded to its wishes, the abolition of privateering would have had, as a logical consequence, the respect on the sea of private property other than legitimate contraband of war.

The United States are fortunately in a position today to enforce international equity, and the appeal of such an undertaking cannot fail to exert itself through this western hemisphere. The most important amongst Spanish-American countries has already openly seceded from a league where she looked in vain for superior justice and only met with the negation of a common one. It is not hazardous to say that every one of the other nations of the New World makes American union precede any other attempt at international association, because all of them are sure that our good understanding is the one which is less governed by selfishness. This is a most important item for an effective result of our cooperation towards the reconstruction of international law. We agree on essentials and also agree in purpose, when others disagree nearly on everything. Ours must be the priority and ours must be the capital glory of this pacific conquest.

PRESIDENT ROOT. Before we adjourn, the Secretary wishes an announcement made regarding a change of program.

In order to enable President Harding to attend the Fleet maneuvers, the reception at the White House scheduled for Thursday afternoon at 2.30 o'clock, has been postponed until Friday afternoon at 2.30 o'clock. Members desiring to be received by the President will assemble in this room on Friday afternoon at 2.15 and go to the White House in a body.

The program for tomorrow is: Meet at 10 o'clock in the morning at this place. The first proceeding will be an address by Dr. James Brown Scott, Director of the Division of International Law of the Carnegie Endowment for International Peace, on the subject of "The advancement of international law essential to an International Court of Justice."

Topic illustrative of work of first subcommittee, which deals with the need to restate the established rules of international law, especially, and in the first instance, in the fields affected by the recent war. Under that heading the subject matter which I have just read will be discussed by Mr. Lester H. Woolsey, former Solicitor for the Department of State, speaking upon "The munitions trade."

Further discussion under the head of formulating and agreeing upon amendments and additions to the rules of international law, will be a paper on "Conditional contraband," by Mr. Charles Cheney Hyde, Professor of International Law in Northwestern University.

That will be followed by a discussion of the law of "Continuous voyage," by Mr. George Grafton Wilson, Professor of International Law in Harvard University.

There will be a meeting of the Executive Council at No. 2 Jackson Place, at half-past two in the afternoon tomorrow.

In the evening the subject of "International criminal jurisdiction," will be discussed by Professor Jesse S. Reeves, of the University of Michigan.

"The status of international cables in war and peace," will be discussed by Elihu Root, Jr., member of the New York Bar, and a discussion of "The international regulation of aerial navigation," will be led by Mr. Arthur K. Kuhn of the New York Bar.

That concludes the exercises of the evening, and we hope to see all of you frequently during the meetings on the following days. We are very much obliged to you for your attendance and your attention.

(Thereupon, at 9.50 o'clock p. m., an adjournment was taken until 10 o'clock a. m., Thursday, April 28, 1921.)

SECOND SESSION

Thursday, April 28, 1921, at 10 o'clock a. m.

The Society met at 10 o'clock a. m., Hon. Elihu Root presiding.

PRESIDENT ROOT. Before beginning the regular exercises, I would like to read to the Society a very agreeable and welcome telegram from the distinguished Antonio S. de Bustamante, President of the Cuban Society of International Law:

> James Brown Scott,
> 2 Jackson Place, Washington.
> My greetings to you and all members of American Society of International Law on the occasion of their twelfth meeting, personally and in the name of the Sociedad Cubana de Derecho Internacional.
>
> ANTONIO S. BUSTAMANTE.

Nothing can be more gratifying than the part which the able and learned leaders of opinion in Cuba play upon their entrance into the field of international law.

Mr. GEORGE W. KIRCHWEY. Mr. President, if it would be proper, I would like to make a motion that a cablegram be sent to the Hon. Antonio S. de Bustamante in the name of the Society, signed by the President, expressing our appreciation.

PRESIDENT ROOT. It is very proper indeed. All in favor of the motion as made by Mr. Kirchwey will signify the same by saying aye; contrary, no. It is so ordered.

Mr. Gregory wishes notice given of a meeting of Subcommittee No. 1 immediately upon the close of the formal exercises this morning.

Lest there be some member of the Society who has not become familiar with the special organization for this meeting, I will repeat it. The gentlemen in charge of the program have taken the recommendations of the Advisory Committee of Jurists at The Hague in respect to the calling of a general conference of the nations upon the subject of international law, as the basis of distribution of subjects for consideration at this meeting, and have constituted four subcommittees of the Committee for the Advancement of International Law. Each of the separate subcommittees has as the basis of its work a paragraph of those recommendations.

The first subcommittee, of which Mr. Charles Noble Gregory is chairman, has as the basis of its work the paragraph of the recommendations in these words: "To restate the established rules of international law, espe-

cially, and in the first instance, in the fields affected by the events of the recent war."

The second subcommittee has as the basis of its work the preparation for ultimate action under the second paragraph, which is in these words: "To formulate and agree upon the amendments and additions, if any, to the rules of international law shown to be necessary or useful by the events of the war and the changes in the conditions of international life and intercourse which have followed the war." Of that subcommittee Dr. Harry Pratt Judson is chairman.

The third subcommittee has the paragraph which reads: "To endeavor to reconcile divergent views and secure general agreement upon the rules which have been in dispute heretofore." Of that committee Governor Simeon E. Baldwin is chairman.

The fourth subcommittee has the paragraph which reads: "To consider the subjects not now adequately regulated by international law, but as to which the interests of international justice require that rules shall be declared and accepted." Of that committee Dr. Paul S. Reinsch is chairman.

The idea of the program is that in this way the necessary preparation, involving the long and intensive study and labor necessary to be had before any international conference can take up these subjects, may be begun and that we may make a start upon it.

I now have the pleasure of presenting to the Society a gentleman whom you may perhaps have heard of, Mr. James Brown Scott, Director of the Division of International Law of the Carnegie Endowment for International Peace, who will speak on "The advancement of international law essential to an International Court of Justice."

ADVANCEMENT OF INTERNATIONAL LAW ESSENTIAL TO AN INTERNATIONAL COURT OF JUSTICE

ADDRESS BY JAMES BROWN SCOTT

Director of the Division of International Law of the Carnegie Endowment for International Peace

Mr. Chairman, and ladies and gentlemen: When the Committee on Program was considering the subjects to be laid before the members and discussed at the annual meeting, it was suggested that there should be an opening address explaining somewhat in detail the purpose of the program.

At that time it was not known what the nature of the address of the President of the Society would be. Those of you who had the pleasure of listening to him last night are no doubt aware that the field which was set aside for me by the Program Committee has been covered by Mr. Root. The remarks which he has made this morning have filled up the gaps, if

any there were. I might therefore appropriately close before beginning by saying: "Ditto to Mr. Burke."

However, as I am on my feet, I shall make some observations on the views which Mr. Root has presented to you, which, however, can hardly be strengthened and can only be weakened by argument.

The great difficulty in the establishment of a court of international law, as distinguished from a tribunal of arbitration, lies in the fact that the rules of law to be applied in a court are supposed to be known in advance. Nations are very chary and properly so about agreeing to an institution and binding themselves in advance to abide by its decisions when they have doubt as to the principles of law which are to be applied or which they may reasonably expect to be applied. Indeed, it is fair to say that one of the reasons why an international court of justice has not been established heretofore, although its necessity or advisability has long been recognized, is the fear entertained by many of the nations, and not the least important ones, that without a preliminary agreement upon the principles of justice expressed in rules of law, it would be asking them to take a leap in the dark, which they are unwilling, if not unable, to do. The situation is very different in the case of a court or tribunal of arbitration. In each instance, the tribunal has to be constituted, and in the special agreement constituting it there is necessarily an agreement upon the rules of law to be observed in the decision of the particular case. The rule may be stated specifically, or generally as the principles of international law found to be applicable, or the principles of equity, or the national laws in so far as they are not inconsistent with the rules of international law or the principles of equity, very frequently called absolute equity. The parties to the dispute submitting it to this form of peaceful settlement are enabled to state not only the facts of the case and reach an agreement upon the case to be presented, but also to agree upon the principles of law or equity, if they exist, which are to be applied, or which they may create and prescribe in advance, if they do not exist, with the distinct understanding that they are to be applied by the members of the tribunal.

Perhaps the most important illustration of this method of procedure is the agreement for the submission of the so-called *Alabama* claims to arbitration. The high contracting parties, Great Britain and the United States, were able to agree to the rules which should be applied. Great Britain maintained that no violation of the then accepted canons of neutrality had been violated. The United States, on the contrary, insisted that the rules of international law then existing had been violated and that Great Britain was liable to damages. As, however, the two countries were anxious to have the disputes removed from their foreign relations, which were greatly embittered by the failure to settle these claims, their statesmen made up their minds to submit them to arbitration. Therefore, they concluded the Treaty of Washington of May 8, 1871, largely for this purpose. They

agreed upon certain rules now known as the Three Rules of Washington, which the arbitrators were to apply and by their application to decide the disputes regarding the claims. Great Britain, however, stood its ground and stated in the text of the agreement that it did not admit the rules were law at the time of the commission of the acts which gave rise to these protracted controversies between the two nations.

This is a very interesting illustration of the cautious way in which nations proceed. They are unwilling to submit their controversies, big or little, to a mixed commission or tribunal of arbitration without having an adequate guarantee in advance that the decisions to be rendered bear some appreciable relation to the views of the parties submitting the disputes. This is the method of arbitration with which we are fortunately familiar.

In resorting to arbitration the parties, as a rule, have control of the appointment of the judges to form the temporary tribunal, and they also have control of the principles of law or of equity to be applied in settling the dispute; whereas in a court organized as a court and functioning as a court, following the standard of judicial procedure as distinct from diplomatic propriety, the parties in litigation may have no guarantee, or do not have a sufficient guarantee in the present condition of affairs, that certain principles to which they ascribe the force of law will, as a matter of fact, be recognized and applied to the decision of the case. Hence, the great difficulty in constituting an international court of justice which shall apply principles of law as accurately and impartially as our municipal courts of justice are in the habit of doing.

There was no doubt in the minds of the delegates assembled at the Second Hague Peace Conference that an international prize court was needed and that it could be formed. There was a large body of law, known as prize law, at hand. It was felt that the law of prize as existing did not or might not cover the entire field. It was agreed, however, in the interest of the proposed institution, that its decisions should be according to treaties, if there were treaties between the litigating parties, or according to the principles of international law, if there were generally recognized principles of international law; and if these did not exist, then, according to the principles of equity, without defining them, which would be laid down by the court and applied to the disputes. Curiously enough, this proposition was made by the British Government, accepted by the conference and incorporated in Article VII of the Prize Court Convention. But after the convention was signed and the British Government considered seriously the question of its ratification, a doubt arose in the minds of British statesmen and publicists as to the wisdom of becoming a contracting party to a permanent international court of prize without an agreement upon the law which must of necessity be administered by that tribunal.

Now there is prize law and prize law, or rather there was then, inasmuch as the Allied Powers seem to have adopted substantially the same princi-

ples in deciding the cases which have arisen out of the World War. There was, however, a great difference in 1907 between what might be called the English or Anglo-American system, for our law, in matters of prize, is much the same, and what may be appropriately called the Continental system of prize law. Our English cousins were, therefore, confronted with the dilemma of accepting the tribunal and investing the judges of that court with the power of deciding what principles should be applied if there were no principles generally recognized, and, in the absence of principles of investing the court with the power of determining what the judges would, in their wisdom, call equitable principles.

Great Britain very properly refused to go into a court of that kind without an understanding upon the law to be observed, because so to do would be in effect, if not in form, to invest the judges of the proposed court with legislative as well as judicial powers. Therefore, a conference of some ten of the leading maritime Powers was called. Their representatives met in London in the winter of 1908–1909, to agree upon the rules of prize law, which were to be followed by the court in the determination of cases to be submitted by the contracting parties. Agreement was reached by the London Naval Conference upon certain fundamentals. But again it was found that in some important respects the rules embodied in the so-called Declaration of London departed from what Great Britain had considered as necessary in the past, and which might be required in the future. Great Britain, therefore, withheld its assent to the Declaration, so that the condition upon which the prize court was to be established failed, and the court did not come into being.

This is precisely the situation which confronts the world at the present day. It wants an international court of justice, of limited jurisdiction and of definite rules of law. To draft a project for this court, to determine its jurisdiction and the rules of law, the Advisory Committee of Jurists chosen from ten different nations, which met at The Hague last summer, and of which the President of this Society was a member, agreed upon certain categories of jurisdiction within which the parties to the creation of the court were to allow themselves to be sued. It was hoped that the Powers accepting the project would agree in advance to come before the court, in cases falling within the agreed jurisdiction, at the instance of any contracting party, which would be called in terms of municipal law the plaintiff or complainant, and that they would also agree in advance that the dispute within the accepted jurisdiction of the court was to be settled by the rules of law set forth in the project. The court would be one of limited jurisdiction, but within the limits binding upon all the parties.

Let me read Article 34, supplying the court with obligatory jurisdiction, and Article 35, prescribing the rules of law for all cases falling within this jurisdiction. The cases involve "(a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which,

if established, would constitute a breach of an international obligation; (d) the nature or extent of reparation to be made for the breach of an international obligation; (e) the interpretation of a sentence passed by the court." In deciding these disputes of a legal nature, Article 35 provides that the court should, within the limits of its jurisdiction as defined in Article 34, apply in the order following:

> (1) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> (2) International custom, as evidence of a general practice, which is accepted as law;
> (3) The general principles of law recognized by civilized nations;
> (4) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

There was some discussion in the Advisory Committee, I understand, whether the new court should exercise the functions of a prize court. Although the reporter does not mention the subject in his report on the labors of the committee, it was understood that prize cases would not necessarily go before the proposed Court of International Justice, but to the prize court agreed upon by the Second Hague Peace Conference, which is one day to be installed in The Hague. When the project of the Advisory Committee was considered by the Council of the League of Nations, the possibility that prize cases might find their way to the Court of International Justice was called to the attention of the Council, and a proposal was made to modify it so as to exclude prize causes from its jurisdiction.

The larger Powers, however, were unwilling to accept obligatory jurisdiction of the court, even with this modification, and the Assembly of the League of Nations struck out Article 34, providing for an obligatory jurisdiction within certain limits. By so doing, it changed the entire character of the institution. The court was indeed to have jurisdiction, but it was only to extend to the cases which the parties should agree to refer to it, and to cases which were specially provided for in treaties and conventions in force. That is to say, a resort to the court is made to depend upon a special agreement of the parties in each case, with the result that the tribunal, which was to be a court in the municipal sense of the word, becomes practically a tribunal of arbitration with a permanent personnel. Happily, the matter does not rest here. It was found possible to find a way out of the difficulty, which would release the Powers which did not care to be bound, and which would bind the Powers which were willing to accept obligatory jurisdiction, by means of a very ingenious protocol, which permits the Powers in signing the project as revised by the Assembly to accept the original Article 34 of the project. In thus binding themselves to resort to the tribunal within the limit specified, they restore the judicial character of the court for the nations so agreeing. This was an admirable solution of a

very difficult problem, and it was apparently done in the hope and in the expectation that the experience to be had with the tribunal in these matters would convince the big nations that they could safely join the smaller states in accepting obligatory jurisdiction within prescribed limits.

But the question remains, how can the scruples of the larger Powers be met and overcome? The president of this Society, in addressing the Committee of Jurists at The Hague, called attention to the position of the larger Powers, on the one hand, and the smaller Powers, on the other. The larger Power is renouncing much and gaining little. The smaller Power, however, is renouncing little and gaining much. The reason is that the larger Powers by such an agreement renounce the right of going to war or of prosecuting their pretensions by force of arms, which they could otherwise do and have been in the habit of doing; whereas the smaller Powers, which are unable to apply force of arms against the larger nations, obtain the guarantee that within the limits of obligatory jurisdiction their cases are to be settled by judicial procedure according to known rules of law, instead of being settled by force. These views found favor with the committee, and they therefore adopted a resolution, drafted by the president of this Society, providing for conferences at stated intervals for the purpose of reaching an agreement upon the rules of international law to be applied by the court. The final clause of Mr. Root's proposition was not included within the resolution as voted, but it is so pertinent to the matter in hand and itself makes the argument, that I should like to read it to you. It is thus worded:

> Your Committee has reported a project for a Permanent Court with general jurisdiction for the decision of all justiciable questions between states submitted to it with the voluntary consent of parties, and with obligatory jurisdiction limited to the decision of the questions described in the 13th article of the Covenant of the League of Nations as arising under treaties and under the accepted rules of international law.
>
> It is believed that the operation of the conferences now recommended will be continually to extend the domain of international law and thus continually to enlarge the obligatory jurisdiction of the court without losing the definite limits necessary to guard against the arbitrary exercise of power.
>
> And it is believed that these institutions for the application of law to the affairs of nations, together with the present permanent Court of Arbitration at The Hague retained for the disposal of questions properly subjects for arbitration as distinguished from strictly judicial action, will constitute a complete system for the effective and progressive observance of the rule of public right as the controlling force in the intercourse of nations.

Now, ladies and gentlemen, if international law be, as has been so finely and authoritatively stated by Mr. Chief Justice Marshall in the case of *The Antelope*, decided by the Supreme Court of the United States in 1825,

the rule of conduct of all nations, because expressly adopted by all, and if no nation or group of nations can make a law for others, inasmuch as every nation is required to accept the rule before it is bound by the rule, it would seem to be necessary that the nations should meet in conference from time to time, and at stated intervals, where they could take up and discuss by their accredited delegates questions which have heretofore been regarded as political, or which have not hitherto been expressed in terms of law. Little by little these questions should, by agreement of the nations, be transferred from the political domain to the judicial forum, so that in the terms of the resolution, the jurisdiction of the court would be extended and extended in accordance with the expressed will of the nations meeting in common council. Therefore, these gatherings were to be Conferences for the Advancement of International Law, and held at stated periods in order to determine what subjects be transferred from the political or the diplomatic domain to the court in order to be passed upon and to be decided as judicial questions.

You will, I am sure, agree with me, ladies and gentlemen, that this process is so reasonable in itself that it does not need authority to be invoked in its behalf. Its reasonableness is its best argument. Nevertheless, authority exists and this resolution is supported by a very famous decision of the Supreme Court of the United States, in which Mr. Justice Baldwin, speaking for the court, in delivering a judgment in the case of Rhode Island *v.* Massachusetts, decided in 1838, and contained in the eleventh volume of Peters Reports of that august tribunal, said not merely the first but the last word on the subject. He sketched the growth of law, showing how questions, which were political in the English system of law, with which we are naturally most familiar, were gradually transferred from the jurisdiction of the King in his Council to courts of justice, and lost their political character in the process. The learned justice, speaking with the approval of the court, felt himself justified in concluding that the mere fact of agreeing to the submission of controversies to a court of justice, constituted in accordance with the municipal system and applying principles of law and equity, changed the nature of the controversies, so that what was before a political question, depending upon arbitrary discretion, became a judicial question, depending upon a rule of law.

The purpose of the resolution of the Advisory Committee adopted last summer at The Hague was to do on an international scale what had been done on a smaller national scale: to transfer certain questions to a court of justice of their own creation to be decided by such a court with a body of law known in advance, to the end that the conduct of nations may be guided by rules of law instead of that greater or lesser force which nations have at their disposal, and that the society of nations may become, in the language of the Massachusetts Bill of Rights, "a government of laws and not of men."

PRESIDENT ROOT. I have the pleasure to present to the Society Mr. Lester H. Woolsey, former Solicitor for the Department of State, who will speak on topic illustrative of the work of Subcommittee No. 1, "The munitions trade."

THE MUNITIONS TRADE

ADDRESS BY LESTER H. WOOLSEY

Former Solicitor for the Department of State

Being a member of Subcommittee No. 3 and not of No. 1, I have not had the advantage of the discussion in Subcommittee No. 1 or of studying its preliminary report. I hope what I have to say, therefore, will not be at variance with the conclusions of that subcommittee.

The munitions trade is an old subject of controversy between nations. They have considered it for at least a century and a half. It is beyond me, therefore, to say anything new. Perhaps then I may be excused if I approach the subject by a brief review of the practice of nations.

In the seventeenth and eighteenth centuries engagements were occasionally entered into between governments not to allow individuals to ship arms and other war supplies to the enemy or rebels of either party. Treaties of this sort were made between Spain and England in 1604,[1] England and Holland in 1654, France and Denmark in 1663, England and Denmark in 1670,[2] France and Hamburg in 1769 and France and Mecklenburg in 1779. It will be observed that these treaties apply to the enemy of either party but not to both belligerents—in a sense treaties of alliance. During the same period, certain sovereignties prohibited by law their subjects from supplying a belligerent with arms. This was done by Bavaria in 1697, Hamburg in 1778, the Pope in 1779, the Sicilies in 1778, Venice in 1779, Sweden in 1779, Denmark in 1756. And the states which joined the Armed Neutrality of 1780–1783 bound themselves to enact similar prohibitions,—Russia, Denmark, Sweden, Prussia, Holland, the Roman Emperor, Portugal, and Sicily were involved.[3]

In the Napoleonic wars England complained of the purchase of arms in the United States by France.[4]

In the Crimean War, Austria, Sweden, Norway, Denmark, Naples, Sardinia and Tuscany prohibited their ships from carrying contraband; Hanover extended this prohibition to all ships leaving her ports; Hamburg, Bremen and Lubeck prohibited the exportation altogether; and Spain, Oldenburg and Mecklenburg had less strict regulations.[5] Prussia on the other

[1] And again in 1814. Geffcken, *Die Neutralität*, §152.

[2] And also in 1780 and 1814. Calvo, *Le Droit Int.* 2d Ed. §1059.

[3] Einicke, *Rechte und Pflichten der Neutralen Mächte im Seekrieg, &c.*, 1907, pp. 80–112.

[4] Lawrence, Principles of Int. Law, 1910, p. 699.

[5] Einicke, *op. cit.* pp. 80–112.

hand not only did not prevent the shipment of arms to Russia, but actually authorized such trade.[6]

In the American Civil War, Germany exported arms with great vigor,[7] and the North purchased about £2,000,000 worth of warlike stores in England[8] but the Union Government did not like the trade in munitions going on between England and the Confederacy and was not slow to voice its views.[9]

In the Franco-Prussian War of 1870 a bill was introduced in the British Parliament to change the existing laws on the shipment of arms and ammunition and it was rejected in the House of Commons and House of Lords. When the Prussian Government complained that shipments were being made by Great Britain to France, Lord Granville did not deny the fact but asserted that Great Britain had invariably assumed the same attitude under similar circumstances when she was not bound to contrary action by treaty.[10] Doctor Lushington, of the High Court of Admiralty, had likewise interpreted the Law of Nations.[11] The United States followed the same course. However, Austria, Belgium, Denmark, Italy, Spain and Switzerland prohibited the exportation and transit of munitions, Belgium and Switzerland[12] on account of their permanent neutrality. Sweden, Portugal, and Spain restricted the transportation of war supplies, while Chile and Peru prohibited the sale of contraband.[13]

In the Russo-Turkish War of 1877–78 great shipments of guns were sent to Turkey and to Russia by the Krupps without objection on the part of the belligerents.[14] And England affirmed the right of her subjects to export arms to Turkey, while Austria revived her restrictions of 1870 on the transportation of contraband under the Austrian flag.[15]

In the Chino-Japanese War of 1894 and the Greco-Turkish War of 1897 there was very little practice,[16] on account of the remoteness of the conflict.

In the Spanish-American War of 1898, Holland prohibited the export of munitions, while Sweden, Norway, Denmark, Portugal, Brazil, Haiti, China, and Colombia placed more or less restriction on their transportation or delivery.[17]

[6] Calvo, *op. cit.* §1059.
[7] Geffcken, *op. cit.* §152.
[8] Beresford and Boyd's Wheaton, Int. Law, 1904, p. 671.
[9] Lawrence, *op. cit.* 1910, p. 700.
[10] Calvo, *op. cit.* §1059.
[11] Creasy, First Platform of Int. Law, p. 606.
[12] Rivier, *Principes du Droit du Gens*, 1896, pp. 408, *et seq.*
[13] Einicke, *op. cit.* pp. 80–112.
[14] Bonfils, *Manual de Droit Int. Public par* Fauchille, 1901, pp. 7 and 8.
[15] Einicke, *op. cit.* pp. 80–112.
[16] *Ibid.*
[17] *Ibid.*

In the Boer War, Great Britain purchased great quantities of war supplies in the United States and even established quasi-supply bases at Chalmette, La., and Lathrop, Mo., under the control of British Army officers in citizens clothes.[18] Germany sold to Great Britain hundreds of thousands of kilos of munitions, and Austria sold smaller quantities.[19]

During the Russo-Japanese war, Denmark, Portugal, Sweden, Norway and China placed similar restrictions on the munitions trade.[20]

During the Turkish-Italian War, French munition makers filled orders for both belligerents[21] and it appears that Germany furnished arms and ammunition to the Ottoman Government.[22]

During the Balkan Wars both Germany and Austria-Hungary supplied munitions to the belligerents.[23]

From this review it will be seen that no uniform practice has existed among nations. Yet the practice has not been so irregular as this account would lead one to suppose. The larger Powers have stood for freedom of trade in contraband by individuals. England and the United States have always maintained the legality of the trade. The doctrine has always been upheld by the United States as being the established rule of international law. It was asserted in 1793 by Mr. Jefferson, in 1796 by Mr. Pickering, in 1855 by Mr. Marcy, in 1862 by Mr. Seward, in 1885 by Mr. Bayard, in 1891 by Mr. Blaine, in 1896 by Mr. Olney, and on many other occasions.[24] It is confirmed by the United States Supreme Court by J. Story in *The Santissima Trinidad*[25] and other cases.

France, Italy, Germany and latterly Austria-Hungary also allowed the trade. On the other hand, the smaller nations, while not denying the right to trade, have frequently prohibited or restricted the trade, for the purpose of avoiding embarrassment or controversy with powerful belligerents. England and France have empowered their governments to impose certain restrictions, but these were evidently not aimed to maintain their neutrality so much as to provide for the national defense in case of necessity.

As to the opinions of jurists on the legality and propriety of trade in munitions by neutrals, I made a careful examination of the principal authorities for the Secretary of State in 1915 when the note to Austria-Hungary of August 12th of that year was prepared. The net result of that examination was, as stated in that note, that "less than one-fifth of the authorities consulted advocate unreservedly the prohibition of the export of contraband."

[18] Merignhac, *Traité de Droit Public Int.*, 1912, pp. 525 *et seq.*

[19] Mr. Lansing, Secy. of State, to Mr. Penfield, Ambassador to Austria-Hungary, Aug. 12, 1915, Spl. Supp. *Am. Jour. Int. Law, IX*, 166.

[20] Einicke, *op. cit.* pp. 80–112.

[21] Merignhac, *op. cit.* 1912, pp. 525, *et seq.*

[22] Mr. Lansing to Mr. Penfield, *supra.*

[23] *Idem.*

[24] Fenwick, The Neutrality Laws of the United States, p. 104.

[25] 7 Wheaton, 340.

At this point a word may be added in regard to a government engaging in the munitions trade. It has long been well established that neutral governments are not to traffic in arms with belligerents. It is reported that the American Government sold large quantities of arms ($4,000,000 worth) to France in 1870 through middlemen, but Prussia appears not to have protested to the United States,[26] a fact which casts some doubt on the truth of the report. In 1894 it is said that the Swiss Government sold rifles to China through British merchants.[27] Nevertheless these instances, if really violations of the rule, are isolated and disapproved. Publicists are unanimously opposed to neutral governments engaging in munitions trade in time of war.

To summarize, it may be said that neutral citizens may trade in arms, ammunition and stores of all kinds in time of war, subject to the risk of such goods being captured and confiscated by the belligerent. One exception has grown up in modern times, namely trade in munitions so as to make neutral territory a base of naval operations or military expeditions. Yet, whenever trade in munitions reaches considerable dimensions to the disadvantage of one belligerent, its adversary is apt to complain, but the answer invariably is that international law does not require the neutral government to interfere to prevent their citizens from engaging in such commerce, or to protect them in pursuing it.

So this was the situation at about the time of the Second Hague Conference in 1907. That conference agreed to provisions on the subject in Convention No. XIII relating to Naval Warfare, reading as follows:

> Article 6. The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of warships, ammunition, or war material of any kind whatever, is forbidden.
>
> Article 7. A neutral Power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunition, or, in general, of anything which could be of use to any army or fleet.[28]

These rules seem reasonably clear and nations have followed them without much confusion. In the recent World War, Spain, Denmark, Sweden, Norway, Holland, Switzerland, China and Brazil prohibited the exportation of arms and ammunition, while the United States became the chief arms factory among the neutrals and maintained the consistency of its traditional policy on this question.

Notwithstanding the practice of the great Powers for a century, and the peculiarly consistent practice of the United States in allowing its citizens to engage in the contraband trade with both belligerents, and notwithstanding the clear provisions of The Hague Conventions on this subject, Germany and Austria-Hungary made formal complaints to the United States

[26] Rivier, *op. cit.* 1896, pp. 408, *et seq.*; Nys *Le Droit Int.*, 1906, Vol. 3, pp. 636, *et seq.*

[27] *Ibid.*

[28] Practically identical with Article 7 Convention No. V, War on Land.

in 1915 against the extensive trade in munitions with the Allies from which the Central Powers were cut off. So history repeats itself. In its note of February 16, 1915, Germany admitted the formal right of neutrals to engage in such trade and even "not to protect their legitimate trade with Germany and even to allow themselves knowingly and willingly to be induced by England to restrict such trade." Germany added that "it is not less their good right . . . to stop trade in contraband, especially the trade in arms with Germany's enemies." This was made the ground in the same note to announce the policy of destroying contraband trade by submarine warfare.[39] The complaint was repeated April 4, 1915.

The United States, in a note of April 21, 1915, stood on the ground that a "change in the laws of neutrality during the progress of the war which would affect unequally the relations of the United States with the nations at war would be an unjustifiable departure from the principle of strict neutrality."

Germany later admitted the full right of the Allies to purchase arms in the United States under The Hague Conventions.

Austria's protest came on June 29, 1915, and while admitting the formal right of neutrals to trade in munitions under the text of The Hague Conventions, pointed out that the preamble of Convention XIII allowed neutrals to alter their laws during the progress of war "where experience has shown the necessity thereof for the protection of its rights." Austria referred to the right of the United States to ship foodstuffs to the Central Powers which was illegally prevented by England. She desired to have the United States threaten the Allies with prohibition of exportation of contraband unless they let food ships through, *i.e.*, to bring about a parity between the two groups of belligerents. As this calls into question the statement of the law on munitions trade in the Hague Conventions, it is well enough to read the preamble of Convention XIII referred to by Austria:—

> Seeing that, even if it is not possible at present to concert measures applicable to all circumstances which may in practice occur, it is nevertheless undeniably advantageous to frame, as far as possible, rules of general application to meet the case where war has unfortunately broken out;
>
> Seeing that, in cases not covered by the present convention, it is expedient to take into consideration the general principles of the law of nations;
>
> Seeing that it is desirable that the Powers should issue detailed enactments to regulate the results of the attitude of neutrality when adopted by them;
>
> Seeing that it is, for neutral Powers, an admitted duty to apply these rules impartially to the several belligerents;
>
> Seeing that, in this category of ideas, these rules should not, in principle, be altered, in the course of the war, by a neutral Power,

[39] German note, Feb. 16, 1915; Spl. Supp. *Am. Jour. Int. Law*, IX, 90.

except in a case where experience has shown the necessity for such change for the protection of the rights of that Power;

Have agreed to observe the following common rules, which can not however modify provisions laid down in existing general treaties, and have appointed as their plenipotentiaries, namely:[30]

It seems clear from the context that the preamble was not intended to be used for the purpose desired by Austria. The United States took this view in its reply of August 12, 1915, and stated once for all its position and policy on munitions trade. Its arguments were that it could not sit in judgment on the progress of a war and balance the inequalities of the conflict by restrictions on its commerce with the belligerents; that the practice of nations, including Austria and her ally Germany, had been to trade in munitions regardless of the relative situations of the belligerents; that the United States policy depended on the right to purchase arms from neutral countries in case of foreign attack; that a contrary principle would tend to force militarism on the world and turn nations into armed camps; that the preamble to Convention XIII was not contrary to this, as it made it discretionary with the neutral as to how it should protect its rights, and that the great weight of authority advocated the freedom of trade in munitions. After this unanswerable statement of the American position no further complaints were made by the Central Powers.

The case, however, carries a lesson for us who are interested in the restatement of the rule regarding munitions trade. It is that the preamble to Convention XIII should be eliminated as tending to cloud the clarity of the rules stated in the body of the convention and tending to form bases for arguments by failing belligerents.

In connection with a restatement of the rules regarding munitions trade, reference should be made to the growing tendency in the last quarter century to prohibit the export of munitions to insurgents or rebels engaged in civil strife. There are a few instances where this has been tried out in Europe,[31] but the practice of the United States is most familiar. I do not refer to the so-called enlistment acts or neutrality laws of the United States to prevent the use of American territory as bases of naval operations or military expeditions. I refer to the Joint Resolution of April 22, 1898, authorizing the President in his discretion to prohibit the export of coal or other material used in war from the ports of the United States, and also to the Joint Resolution of March 14, 1912, providing:

That whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export except under such limitations and exceptions as the President shall prescribe any arms or munitions of war from any place in the United

[30] Hague Conventions and Declarations of 1899 and 1907, Scott, p. 209

[31] Einicke, *op. cit.* pp. 80–112.

States to such country until otherwise ordered by the President or by Congress.

A somewhat similar provision was incorporated in the Espionage Act of June 15, 1917. In the meanwhile, in 1915 President Wilson made a proposal to the A B C countries of South America to embody such a prohibition in a general treaty in the following words:—

> Article IV. To the end that domestic tranquillity may prevail within their territory, the high contracting parties further agree not to permit the departure of any military or naval expedition hostile to the established government of any of the contracting parties and to prevent the exportation of arms and munitions of war destined to any person or persons in insurrection or revolt against the government of any of the contracting parties.

The proposed treaty, however, was never concluded. Curiously enough, the same idea cropped up at the Paris Conference, where a general treaty on traffic in arms was signed at St. Germain, September 10, 1919, between the Allied countries. The treaty goes much beyond the Brussels Act of July 2, 1890, which it supplants. The parties agree in general terms to prohibit the export of arms and ammunition used in war, except for the use of the signatory *governments*, and also to prohibit the export of firearms, other than those used in war, when destined to certain closed zones and territories enumerated. So far as I know, this treaty has not been transmitted to the Senate by the President and is not as yet in effect in Europe.

The tendency indicated by the foregoing may well raise some question as to the soundness and the advisability of adding these additional rules to those governing munitions trade. The tendency obliterates the distinction long maintained in the United States between an exportation of arms involving the use of territory as a base of operations and an exportation as a purely commercial venture. The tendency limits greatly the power to exercise the inherent right of revolution against an oppressive government. It tends to an alliance between governments for their maintenance in power. It is based on the same idea of self-satisfaction which we find common in concerts of Powers from the Holy Alliance to the present time. Concerts like to crystallize the then existing situation and overlook the fact that the world is a living organism and a growing one. The world is perhaps old enough to be an adult, but it is not and refuses to be confined by inelastic bonds. I do not think, therefore, that now is the time to have a general agreement on this point like that of St. Germain. It seems to me preferable to have this matter of the export of arms to rebels controlled by municipal law as at present.

PRESIDENT ROOT. I have the pleasure of presenting to the Society to discuss the topic illustrative of the work of Subcommittee No. 2, entitled "Conditional contraband," Mr. Charles Cheney Hyde, Professor of International Law in Northwestern University.

Mr. CHARLES CHENEY HYDE. May I make a brief explanation before reading the statement? When Dr. Scott was good enough some time ago to ask me to take part today, I was simply snowed under in the effort to put through the press a book dealing with international law chiefly as interpreted by the United States, and the only possible means I had of complying with Dr. Scott's request was to secure the permission of the publishers to read a few advance sheets. That consent was readily given, but, Mr. Chairman, the problem is rather difficult for this reason, that while I am able to state the conclusions rather fully which have been reached touching one point, namely, the condition of foodstuffs as conditional contraband, it has been impossible in the brief time to deal with the vast material necessarily concerned. Therefore, if my summaries seem too brief, I ask your respectful indulgence.

CONDITIONAL CONTRABAND[1]

ADDRESS BY CHARLES CHENEY HYDE

Professor of International Law in Northwestern University

At the time when the United States declared its independence the experience of nations had developed a practice which, on the one hand, acknowledged the right of a belligerent to seize on the high seas property even of neutral ownership and found on board vessels of whatsoever national character, if destined to the enemy and calculated to aid its operations, and which, on the other, restrained a belligerent in determining under what circumstances property might be justly regarded as bearing such a relation to the enemy. It was the nature of the restraint as well as the scope of the right which it became the task of American statesmen to clarify. The significant fact is that long before the close of the eighteenth century there was an understanding apparent, in England as well as continental Europe, that a belligerent was not free to cut off generally neutral commerce with enemy territory. Such a situation was in sharp contrast to that which had once prevailed, when no State engaged in war hesitated to regard as hostile to itself, and therefore as subject to restraint, the ships or goods of any foreign merchant who ventured to trade with the enemy.[2]

[1] From the advance sheets of a book entitled: International Law Chiefly as Interpreted and Applied by the United States, and read with the consent of the publishers, Messrs. Little, Brown & Company, Boston.

[2] T. A. Walker, Hist. Law of Nations, I, 136, quoted in H. R. Pyke, Law of Contraband of War, 30. See, also, E. Nys, *Les Origines du Droit International*, 226–228; Westlake, 2 ed., II, 198; J. B. Moore, "Contraband of War," Philadelphia, 1912, *Proceedings, Am. Philosophical Society*, LI, No. 203, 39.

Concerning the practice of England during the sixteenth century, see Edward P. Cheyney, History of England from the Defeat of the Armada to the Death of Elizabeth, Philadelphia, 1914, I, chap. xxii, and documents there cited.

The reasons which had gradually compelled some measure of respect for the neutral claim may have been various. Possibly the most influential were the increasing inability of a belligerent to win respect for its pretensions, and the danger to itself involved in the attempt to enforce them.

While it would be inaccurate to attribute to Grotius the reasons which in England, and later in the United States were advanced in support of a belligerent right to capture and confiscate articles useful in the arts of peace as well as in the science of war, the doctrine of conditional contraband, as it was developed in those countries, doubtless owed much to his classification. That doctrine was based upon the theory that a belligerent should not be deterred from confiscating articles normally not to be deemed contraband, if it could be shown that they were actually destined for a hostile use by the enemy. If the application of this principle opened the way to abuse of power and so afforded opportunity for dangerous extension of the belligerent prerogative as understood in continental Europe, the advocates of it were at least able to maintain that it contemplated no unrestrained confiscation of articles not destined for a hostile use, and that it called for a moderation of conduct oftentimes not manifested by belligerent states committed to an opposing view.[3] Grave practical considerations pertaining both to the matter of proof and the nature of the use which should justify confiscation, served to render it increasingly difficult to obtain general agreement as to the precise circumstances justifying the confiscation of articles alleged to be conditional contraband. The procedure adopted in certain quarters proved to be a means of harassing rather than protecting neutral commerce. Moreover, the method of classification necessitated the use of tests which belligerents ignored in determining what should be regarded as absolute rather than conditional contraband.

Thus the controversy possessed a twofold aspect, with respect, first, to the nature of articles to be deemed generally subject to confiscation, and, secondly, to the circumstances when articles of a particular kind, such as those useful in the pursuits of peace as well as of war, should be treated as if they were contraband. Permanent adjustment required wide recognition of the true reason why a belligerent might justly endeavor to confiscate neutral goods consigned to the territory of the enemy. If that reason was merely the military necessity of the belligerent as conceived by itself, general acquiescence on the part of the family of nations would have assumed a form distinctly intolerant of neutral claims. In such case the embarrassment occasioned a belligerent through the commercial intercourse of neutrals with its adversary would have encouraged the former to resort to pretext for the treatment as contraband of any articles whatsoever, and thus to substitute for blockade a possibly more convenient method of cutting off access to enemy territory. If, on the other hand, the reason was founded on the right to prevent the enemy from deriving definite succor

[3] Westlake, 2 ed., II, 285.

as a belligerent from articles destined to its territory or to its forces, there was a solid ground on which a state engaged in war might base a claim to confiscate, and one also justifying resentment of the efforts of a neutral to obstruct the repression of a trade constituting participation in the conflict.

When the United States entered upon its being as a nation, two opposing ideas had long found expression in European conventions—that contained in the Treaty of the Pyrenees concluded between France and Spain, November 7, 1659,[4] confining articles of contraband to those of warlike character and excluding foodstuffs, and that set forth in the Treaty of Whitehall, concluded between Great Britain and Sweden, October 21, 1661, placing money and provisions in the same category as munitions of war.[5] The latter was thus declaratory of a theory hostile to the rights and interests of neutral maritime Powers, and sharply in contrast to the spirit of a series of conventions which the United States began to conclude.

These generally followed the theory of the Treaty of the Pyrenees; and it may be doubted whether the Jay Treaty of 1794 was designed to approve of any other.

Controversies respecting foodstuffs have always furnished practical tests of the reasonableness of the doctrine of conditional contraband. They shed light on the question whether it should be retained in the law of nations. By way of summary of the experience of the United States from 1793 until 1909 it may be observed: first, that the Department of State in diplomatic discussions steadfastly denied the right of a belligerent to deal with foodstuffs as absolute contraband; secondly, that it abstained from concluding treaties even in the nineteenth century declaring that such articles should be deemed even conditional contraband; thirdly, that the Supreme Court of the United States doubtless influenced by the views of Sir William Scott, both in 1816, and in the cases arising from the Civil War, gave definite recognition to the doctrine of conditional contraband; fourthly, that as a belligerent in 1898 the United States was disposed to apply the doctrine to foodstuffs; fifthly, that during the Russo-Japanese War, the United States as well as Great Britain maintained a similar stand, causing Russia to yield thereto.

It will be recalled that the Second Hague Peace Conference of 1907 produced no convention dealing with contraband, but that it was proposed on behalf of the United States, that the right of capture should be confined to articles agreed to be absolute contraband.

The Declaration of London of 1909 enumerated lists of articles to be treated as absolute contraband, and as conditional contraband, and of those not to be declared contraband. Foodstuffs were placed in the con-

[4] Arts. XII and XIII, *Les Grands Traités du Règne de Louis XIV*, Paris, 1893, 100, 101; Dumont, VI, 266.

[5] Art. XI, Brit. and For. State Pap., I, 701, 705.

ditional class.[6] Conditional contraband was, according to Article XXXIII, liable to capture if shown to be destined for the use of the armed forces or of a government department of the enemy state, unless in the latter case the circumstances showed that the articles could not in fact be used for the purposes of the war in progress.[7] The destination referred to in that article was presumed to exist if the goods were consigned to enemy authorities, or to a contractor established in the enemy country who, as a matter of common knowledge, supplied articles of such a kind to the enemy. A similar presumption was said to arise if the goods were consigned to a fortified place belonging to the enemy, or other place serving as a base for the armed forces of the enemy. No such presumption was, however, to be raised in the case of a merchant vessel bound for one of such places, and if it was sought to prove that she herself possessed a contraband character. In cases where the foregoing presumptions did not arise it was declared that the destination was presumed to be innocent. The presumptions established in the article were capable of rebuttal.[8] Conditional contraband was, moreover, rendered not liable to capture, according to Article XXXV, except when found on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it was not to be discharged at an intervening neutral port. The ship's papers were to be regarded as conclusive proof both as to the voyage on which the vessel was engaged, and as to the port of discharge of the goods, unless she was found clearly out of the course indicated by her papers, and unable to give adequate reasons to justify such deviation.[9] In the attempt to render the doctrine of continuous voyage inapplicable to conditional contraband, it would have been desirable to indicate with greater precision the circumstances when articles within that category should be free from the danger of condemnation. The effort to compensate a belligerent for the restriction applied with respect to the doctrine of continuous voyage, resulted in an arrangement which removed safeguards supposedly surrounding articles deemed conditional contraband, and served to obliterate the distinction between them and articles acknowledged to be absolute contraband.[10]

[6] For the text of the Declaration of London see Charles' Treaties, 268, also Naval War College, Int. Law Topics, 1909, 169.

[7] It was declared that this last exception did not apply to a consignment coming under Art. XXIV (4) of gold and silver in coin or bullion, and paper money.

[8] Art. XXXIV.

[9] See report by Mr. Renault in behalf of the Drafting Committee with respect to Articles XXXIII–XXXV, Charles' Treaties, 300–302; also report of the American delegates (Rear Admiral Stockton and Professor Wilson) to the Secy. of State, *id.*, 332, 334, 335.

Also instructions of Sir Edward Grey, British Foreign Secy., to Lord Desart, British plenipotentiary at the London Conference, Dec. 1, 1908, Misc. Nov. 4, 1909, International Naval Conference, ed. 4554, 20, 23; J. B. Scott, "The Declaration of London," *Am. Jour. Int. Law*, VIII, 274 and 520.

[10] Declares Professor Moore: "These grounds of inference are so vague and general hat they would seem to justify in almost any case the presumption that the cargo, if bound

Events of the World War served to emphasize the reluctance of belligerent states to observe uniform respect for the theory of conditional contraband as it had been advocated by neutral Powers in the Russo-Japanese War.

The controversy between the United States and Great Britain with respect to foodstuffs in 1914 and 1915, concerned the treatment of cargoes consigned to neutral ports rather than those consigned to, and on board of vessels bound for, Germany.[11] Sir Edward Grey, British Foreign Secretary, took occasion, however, to declare that the most difficult questions in connection with conditional contraband arise with reference to the shipment of foodstuffs, and acknowledged that no country had in modern times maintained more stoutly than Great Britain the principle that a belligerent should abstain from interference with such articles intended for a civil population. He questioned, however, whether the existing rules with regard to conditional contraband, framed as they were with the object of protecting so far as possible supplies intended for the civil population, remained effective for the purpose, or were suitable to existing conditions. He said that the principle involved was one which the British Government had constantly had to uphold against the opposition of continental Powers. In the absence of some certainty that the rule would be respected by both parties to the existing conflict, he expressed doubt whether it should be regarded as an established principle of international law.[12] He contended also that elaborate machinery had been organized by the enemy for the supply of foodstuffs for the use of the German armies from overseas. He declared that under such circumstances it would be absurd to give any definite pledge that in cases where supplies could be proved to be for the use of the enemy forces, they should be given complete immunity by the simple expedient of dispatching them to an agent in a neutral port. The reason, he

to any enemy port, was 'destined for the use of the armed forces or of a government department of the enemy State.' Any merchant established in the enemy country, who deals in the things described, will sell them to the Government; and if it becomes public that he does so, it will be 'well known' that he supplies them. Again, practically every important port is a 'fortified place'; and yet the existence of fortifications would usually bear no relation whatever to the eventual use of provisions and various other articles mentioned. Nor can it be denied that, in this age of railways, almost any place may serve as a 'base' for supplying the armed forces of the enemy. And of what interest or advantage is it to a belligerent to prevent the enemy from obtaining supplies from a 'base,' from a 'fortified place,' or from a merchant 'well known' to deal with him, in his own country, if he is permitted freely to obtain them from other places and persons, and especially, as countries having land boundaries can for the most part easily do, through a neutral port?" "Contraband of War," Philadelphia, 1912, p. 39.

[11] Mr. Bryan, Secy. of State, to Mr. W. H. Page, American Ambassador at London, telegram, Dec. 26, 1914, American White Book, European War, I, 39; Spl. Supp. *Am. Jour. Int. Law*, IX, 55.

[12] Sir Edward Grey, British Foreign Secy., to Mr. W. H. Page, American Ambassador at London, Feb. 10, 1915, *id.*, White Book, 44, 50, 51; Spl. Supp. 65.

said, for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces or enemy government disappeared when the distinction between the civil population and the armed forces itself disappeared.[13] He declared also that the power to requisition would be used to the fullest extent in order to make sure that the wants of the military were supplied, and that however much goods might be imported for civil use, it was by the military they would be consumed if military exigencies so required, especially in view of the fact that the German Government had taken control of all the foodstuffs in the country. It is believed that in point of principle this argument was unanswerable. If it could be shown that all provisions imported into the territory of a belligerent state would be likely to minister to the needs of its military and naval forces by reason of a general shortage of foodstuffs, the attempts of neutral traders to ship such articles to that territory would constitute participation in the war and transform their traffic into one of contraband.

In early stages of the World War, foodstuffs were scheduled as conditional contraband in the lists announced by Great Britain, France and Russia. Germany indicated a readiness to respect the substance of the Declaration of London (which treated foodstuffs as conditional contraband), and to apply its provisions, if they were not disregarded by other belligerents.[14] On April 18, 1915, the German prize ordinance "in retaliation of the regulations adopted by England and her Allies, deviating from the London Declaration of maritime law" declared that foodstuffs and other specified articles "coming under the designation of conditional contraband," would be "considered as contraband of war."[15] On April 13, 1916, the British Foreign Office announced that the circumstances of the war were so peculiar that His Majesty's Government considered that for practical purposes the

[13] *Compare* the reasoning of Mr. Hammond, British Minister to the United States, in his communication to Mr. Jefferson, Secy. of State, Sept. 12, 1793, Am. State Pap., For. Rel. I, 240.

[14] Mr. Gerard, American Ambassador at Berlin, to Mr. Bryan, Secy. of State, telegram, Sept. 4, 1914, American White Book, European War, I, 27; Spl. Supp. *Am. Jour. Int. Law*, IX, 37.

It should be observed that while the Senate of the United States had on April 24, 1912, advised and consented to the ratification of the Declaration of London, it was not ratified by the President, and hence never proclaimed. Naval War College, Int. Law Topics, 1915, 93. On Aug. 6, 1914, the United States suggested to the belligerent Powers the advisability of adopting the declaration as a temporary code of naval warfare during the existing conflict. This suggestion was withdrawn Oct. 24, 1914, because of the unwillingness of certain belligerents to accept the declaration without modification. The Department of State simultaneously declared that the Government would insist that the rights and duties of the Government and citizens of the United States in the war be defined by the existing rules of international law and the treaties of the United States "without regard to the provisions of the declaration." Mr. Lansing, Acting Secy. of State, to Mr. Gerard, American Ambassador at Berlin, telegram, Oct. 24, 1914, American White Book, European War, I, 8; Spl. Supp. *Am. Jour. Int. Law*, IX, 7. Also correspondence, *id.*, White Book, 5–8; Spl. Supp., 1–7.

[15] American White Book, European War, I, 30; Spl. Supp. *Am. Jour. Int. Law*, IX, 43.

distinction between absolute and conditional contraband had ceased to have any value. So large a portion of the inhabitants of the enemy country were taking part, it was said, directly or indirectly, in the war that no real distinction could be drawn between the armed forces and the civilian population. It was declared that the enemy government had taken control, by a series of decrees and orders, of practically all the articles in the list of conditional contraband, so that they were then available for government use. So long as such exceptional conditions continued, British belligerent rights with respect to the two kinds of contraband were, as was said, the same, and treatment of them would have to be identical. Foodstuffs, with other articles normally in the conditional class, were placed in the broad category of articles deemed simply contraband.[16]

In the Naval Instructions of the United States Governing Maritime Warfare, issued June 30, 1917, "all kinds of fuel, food, foodstuffs, feed, forage, and clothing and articles and materials used in their manufacture" were declared to be contraband when "actually destined for the use of the enemy government or its armed forces, unless exempted by treaty."[17]

Conclusions

The foregoing discussions justify certain conclusions. They illustrate the failure of maritime Powers to reach any agreement with respect to the treatment to be accorded foodstuffs, and the insufficiency of any existing code to meet with general approval or to restrain belligerent action. Such failure and insufficiency may have been due in part to the circumstance that in the formulation of rules, the special interests of particular states or groups of states have overshadowed any united effort to promote justice for all. Attempts, moreover, to outline a procedure according, on the one hand, some measure of protection to articles such as foodstuffs, and on the other, exposing them to capture and condemnation, have been unresponsive to the practical requirements of international trade, on account of the constant doubt as to the safety of any neutral cargo destined, under almost any circumstances, to any belligerent port.[18]

[16] Inclosure in report of Mr. Reed, American Vice-Consul at London, to Mr. Lansing, Secy. of State, Apr. 20, 1916, American White Book, European War, III, 109; Spl. Supp. *Am. Jour. Int. Law*, X, 51.

[17] No. 24, p. 15. See, also, Nos. 70, 71 and 72. It is to be noted that the Naval Instructions of June 30, 1917, make no use of the term "conditional contraband."

[18] Declared Sir Edward Grey, British Foreign Secy., to Lord Desart, British plenipotentiary, to the London Naval Conference, Dec. 1, 1908: "It should be borne in mind that what the commerce of the world above all desires is certainty. The object of all rules on this subject should be to insure that a trader anxious to infringe in no way the accepted rights of belligerents, could make sure of not being, unwittingly, engaged in the carriage of contraband, and of thus avoiding the danger of condemnation and loss either of goods or ship, while the trader who deliberately shipped or carried contraband would do so with a knowledge of the risk he ran, and would have no claim to sympathy or compensation if his

By reason of the volume of exports from its territory, the United States still finds in the treatment of foodstuffs the most serious problem confronting it with respect to contraband. On principle, as has been observed, the right of a state engaged in war to treat as contraband any article of neutral commerce on its way to belligerent territory is attributable, not to inconvenience or annoyance occasioned by the prosperity of the enemy through the vigor of its foreign commerce, and still less to the necessities of the captor, but rather to the fact that the neutral contribution serves an essentially military end by strengthening the recipient as a belligerent. The question is, therefore, whether at the present time foodstuffs, howsoever consigned to belligerent territory, may be justly deemed to serve such an end. It must be clear that if in any conflict importations of them are shown to toughen the sinews of a belligerent by saving its soldiery from starvation, and to produce directly that effect, the right of the enemy to cut off that source of aid by dealing with the forms of sustenance as contraband, is unassailable. Nor, under such circumstances, is it less so, if food supplies are consigned to private agencies rather than governmental establishments. In either case there is a destination which the opposing belligerent may fairly regard as hostile.

Thus, at the present time, the merit of the claim of a neutral that exportations of foodstuffs from its domain to belligerent territory should not be dealt with as a trade in contraband, depends upon the fact that such articles entering that territory are not, and will not become a source of military strength to its sovereign. At the close of the eighteenth century it was not only easy for a neutral to make such a showing, but also very difficult for a belligerent to prove that its treatment of foodstuffs as contraband was for a purpose other than to harass a non-combatant population, rather than to deprive the enemy of a military advantage. It was this circumstance which rendered feasible and acceptable the numerous treaty provisions protecting foodstuffs from condemnation as contraband, and which accounted for the distinction as to ultimate use laid down by Sir William Scott and followed by the Supreme Court of the United States. Otherwise it would have been impossible for a practice to develop which tended to place upon a belligerent the burden of proving the ultimate hostile use of provisions bound for the territory of its enemy. The rule of restraint, in so far as there was one, manifested regard for actual conditions of neutral trade. It did not purport to cope with those which did not exist, and still less to hamper a belligerent in intercepting articles likely to fulfill a distinctly hostile purpose.

As war is now conducted, it is a probability rather than a possibility that foodstuffs imported into belligerent territory will serve a military end

ship or goods were captured and subsequently condemned by the due process of a prize court." Correspondence respecting the International Naval Conference, Misc. No. 4 (1909), cd. 4554, 20, 23.

and so be used for a hostile purpose. It may be doubted whether, in a conflict greatly taxing the strength of the participants where the entire male population capable of bearing arms is called to the colors and where the power of requisition is lodged in and exercised by a central government, the necessary showing as to non-military use can be made. Reason for doubt becomes strong where a belligerent state, the population of whose territory furnishes large importers, lacks a supply of food sufficient to maintain the inhabitants of its domain. It is not suggested, however, that in a particular case assurance may not be given, convincing to all concerned, that no military advantage will be gained or taken by a belligerent from imported foodstuffs. In such a situation a neutral state would have the strongest ground to protest against their treatment as contraband. It must, nevertheless, be acknowledged that the temptation of a belligerent to use for a military purpose any articles adapted for that purpose and within its reach, might prove irresistible if the need were imperative. The danger of enabling such a state to receive into its domain what, under any circumstances, might serve to avert defeat or prolong the war cannot be ignored.

It is clear that a just solution of the problem forbids that the matter be left to vague surmises indissolubly connected with the application of the theory of conditional contraband. There should be no recrudescence of arguments once prevailing in British and American prize courts on account of conditions of trade long since obsolete. The need of general and precise agreement among maritime Powers is obvious. The possibility of effecting one is believed to depend upon the candor and readiness with which states concerned, such as the United States, acknowledge the applicability of the fundamental principle that a belligerent may intercept whatever offers military aid to its adversary. Such acknowledgement is not inconsistent with the resonableness of an unmolested neutral trade in that which does not in fact afford such aid. New rules must, however, point to a definite and authoritative mode of establishing the innocence of the traffic. It may be fairly contended that existing conditions of war place the burden squarely upon those who claim the right to be unmolested. Neutral as well as belligerent governmental assurance ought to be given the state called upon to forego the right of capture and confiscation. In a word, the right to deal with foodstuffs as contraband must be recognized, and simultaneously that of neutrals to demand that a belligerent refrain from exercising its privilege in case of a sufficient showing as specified by general agreement, that such articles will serve no military end. In the absence of such a showing, it is not unreasonable that foodstuffs consigned to belligerent territory should be deemed to have a hostile destination. The bare need of provisions for its own use should never, however, suffice to excuse a belligerent from dealing with them as contraband. That excuse requires no invocation where the neutral claim to immunity fails to be supported by the requisite proofs of its merit.

It is in the nature and scope of assurance of innocent use that lies the hope of retaining for neutral states the enjoyment of a trade which, as war is now waged, must otherwise be regarded as a traffic in contraband.[19] It is not suggested, however, that adequate assurance may always be given, or that a belligerent may not with reason decline as insufficient that which is offered in a particular case.[20]

If it is permitted at this time to make a concrete suggestion for the consideration of the Second, and possibly also the Third Subcommittee, it would be the following:

That the Committee for the Advancement of International Law propose, first, that the United States consider the formal abandonment of the doctrine of conditional contraband, and specifically with reference to the treatment of foodstuffs; secondly, that the United States consider the feasibility of proposing a general agreement concerning the operation and effect of neutral governmental certification of the non-hostile uses of neutral foodstuffs destined to hostile territory, as a safeguard against capture and condemnation.

President Root. The suggestions made by Mr. Hyde at the close of his very interesting paper will be referred to the Committee on Advancement of International Law and to Subcommittee No. 2 without any further formality.

I now have the pleasure of presenting for the discussion of the topic illustrative of the work of Subcommittee No. 3, under the head of "Continuous voyage," Mr. George Grafton Wilson, Professor of International Law in Harvard University.

[19] See in this connection the views of Professor John Bassett Moore in address before American Philosophical Society, Philadelphia, 1912; and also at St. Louis, in 1915.

[20] Food imported into belligerent territory for any class of the population necessarily releases for consumption other food, and so tends to cause each shipload received from abroad to become an indirect source of maintenance of the military and naval forces, even if consumed entirely by persons unattached thereto. Thus the power of substitution accorded the belligerent whose civil population is maintained by imports may prove a vital means of averting the starvation of armies.

The United States as a belligerent in 1917 and 1918 applied this principle in limiting exports of foodstuffs to neutral European States in close proximity to Germany. It became important that American exports, although to be consumed by the inhabitants of neutral territories, should not prove to be the means of releasing for export therefrom to Germany provisions which otherwise could not be spared. The United States demanded, therefore, assurance that neutral States importing American foodstuffs should not thereby become special purveyors to the enemy. See, for example, statement issued by War Trade Broad, in Official Bulletin for May 4, 1918, respecting a general commercial agreement between the United States and Norway, signed by Mr. Vance C. McCormick, chairman of the War Trade Board, and by Dr. Nansen, special representative of the Norwegian Government.

CONTINUOUS VOYAGE

ADDRESS BY GEORGE GRAFTON WILSON

Professor of International Law in Harvard University

The topic "Continuous Voyage" has been chosen by the Committee on Programme for this Fifteenth Annual Meeting of the American Society of International Law as illustrative of the work of Subcommittee No. 3. This committee has as its aim to reconcile divergent views upon "rules which have been in dispute heretofore." The doctrine of continuous voyage is certainly one of the topics which might properly be regarded as long subject to differences of opinion. In its evolution it has often changed in significance, as may be seen from a review of its development.

Early treaties contained provisions in regard to commerce, *e. g.*, one to which there has been many references is the treaty between Great Britain and the United Provinces, Dec. 1/11, 1674, Art. II:

> Nor shall this freedom of navigation and commerce be violated, or interrupted by the reason of any war; but such freedom shall extend to all commodities which might be carried in time of peace; those only excepted, which are described, under the name of contraband goods, in the following articles.

A memorandum given by France for the guidance of Dutch merchants and published by authority in the Utrecht *Gazette*, July 8, 1756, states a principle revived by Great Britain in 1915:

> Art. 7. If the Dutch ships carry any goods or merchandise of the growth or manufacture of the enemies of France, they shall be esteemed good prizes; but the ships shall be discharged.
>
> N. B. The regulation made in the last war, permitted the Dutch to trade with the enemy, in conformity to the Treaty of Commerce made with the States in 1739. But as the King revoked that Treaty at the conclusion of the war, the goods of the growth or manufacture of England, or belonging to the English, which shall hereafter be found on board a Dutch ship, shall be declared good prize, unless the 14th article of that Treaty should hereafter be renewed.[1]

The problem of continuous voyage, as it was understood in the middle of the eighteenth century, may be inferred from the statement of the case of Hillbrands *contra* Harden, 1761:

> By the treaties of alliance betwixt Great Britain and Holland, particularly that of 1674, the liberty of navigation and commerce is secured to the one state even with the enemies of the other; and, excepting contraband goods, that no ship of either nation shall be searched for goods belonging to the enemies of the other, and that they shall be free to carry all goods which they can lawfully carry in time of peace, even supposing the whole cargo should belong to an enemy.

[1] Marriott, Case of the Dutch Ships, p. 74.

> In the present war betwixt Britain and France, the power of the latter at sea has been so reduced as to oblige them for safety to carry on their whole commerce in Dutch bottoms. And if this plan can be carried into execution under color of the above mentioned treaties, the British merchants lie under a great disadvantage; for their cargoes lie open to capture, while the French cargoes are free from it.
>
> By edicts of the king of France, no goods can be exported from their colonies but in French bottoms. At present these edicts are suspended and the commodities of the French colonies are imported into France in Dutch bottoms. At least Dutch ships are employed within the narrow seas where there is the greatest risk of capture. . . . In short French goods in a Dutch ship ought to be secure, where the Dutch ship is preferred as the better sailor, or as being hired at a cheaper rate. But where none of these circumstances occur, and that the Dutch ship is preferred for no other reason than to protect from capture, it ought not to have the benefit of the treaties.[2]

Lord Stowell, in the case of *The Immanuel*, said:

> But without reference to the accidents of the one kind or the other, the general rule is that the neutral has the right to carry on, in time of war, his accustomed trade to the utmost extent of which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war by no other title than by the success of one belligerent against the other, and at the expense of that very belligerent under whose success he sets up his title; and such I take to be the colonial trade, generally speaking.[3]

Closed trade regulations were common during the nineteenth century. Even the coastwise trade of the United States was reserved to American vessels, and later the same principle was extended to Porto Rico and the Philippines after they were acquired in 1898.

In 1810 Lord Stowell said in the case of *The Luna*

> I cannot admit that, because the port of St. Sebastian's borders on ports which are blockaded, that therefore it is less accessible than any other port; the introduction of such a principle would have the effect of stretching out the limits of every blockade to an indefinite extent.[4]

Early in the nineteenth century it had been repeatedly decided in prize courts "That neutrals are not at liberty to engage in a trade with the colony of the enemy in time of war, which is not permitted to foreign vessels in time of peace." This briefly states the Rule of 1756 as understood by Lord Stowell.

Sometimes vessels of one state were allowed to carry on trade between their own ports and the colonial ports of another state. This trade was at times permitted to continue without molestation in the time of war, even though one belligerent had cut off the colonies of the other belligerent. Sometimes neutrals might be permitted to enter into previously closed

[2] Kames, Select Decisions, 242. [3] 2 C. Rob. 197. [4] Edwards, 190.

colonial trade. These neutrals might also be engaged in trade with the belligerent country. Some merchants accordingly conceived the idea of bringing goods from the colony to a neutral state, discharging in a neutral port, and passing the goods through customs, then reloading and carrying the goods to the mother country. For example, during the war between Great Britain and Spain, transportation from Spanish colonies to Spain under the United States flag was common in early nineteenth century by the way of the United States. Goods were carried from the colonial Spanish port of La Guayra to Marblehead in the United States, were there entered under bond during slight repairs to the vessel, and then reshipped for Bilbao. On this last stage of the journey, an American vessel was captured and taken to a British prize court, as engaged in trade between Spain and her colonies. Of this transaction the court said:

> The act of shifting the cargo from the ship to the shore and from the shore back again to the ship does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done. . . . The truth may not always be discernible, but when it is discovered, it is according to the truth and not according to fiction that we are to give the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have ended.[5]

This principle is related to the so-called Rule of 1756 and sets forth the idea of continuous voyage as understood at the beginning of the nineteenth century.

Chancellor Kent said:

> It is very possible that if the United States should hereafter attain that elevation of maritime power and influence which their rapid growth and great resources seem to indicate and which shall prove sufficient to render it expedient for her maritime enemy (if such enemy shall ever exist), to open all his domestic trade to enterprising neutrals, we might be induced to feel more sensibly than we have hitherto done the weight of the argument of the foreign jurists in favor of the policy and equity of the rule.[6]

Thus it came to be held in many cases, before the American Civil War, that the destination of the cargo followed the destination of the vessel. During the Civil War, by extension of the doctrine, the destination of the cargo and of the vessel was separated. The early ideas had in view the transport from a closed colonial port; the later extension was applied to transport between neutral ports, if an ultimate enemy destination could be proven. As was said by the United States Supreme Court in the case of *The Circassian* in 1864:

[5] *The William*, 5 C. Rob. 387. [6] Commentaries (A), p. 229.

> A vessel sailing from a neutral port with intent to violate a blockade is liable to capture and condemnation as a prize from the time of sailing, though she intends to call at another neutral port, not reached at time of capture, before proceeding to her ulterior destination.[7]

As the doctrine of separation of liability of cargo and vessel had developed, this was applied in the case of *The Bermuda* in 1865, in which Chief Justice Chase said:

> The interposition of a neutral port between neutral departure and belligerent destination has always been a favorite resort of contraband carriers and blockade runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous so long as intent remains unchanged, no matter what stoppages or transhipments intervene. . . . Even the landing of goods and payment of duties does not interrupt the continuity of the voyage of the cargo, unless there be an honest intention to bring them into the common stock of the country. If there be an intention, either formed at the time of original shipment or afterwards, to send the goods forward to an unlawful destination, the continuity of the voyage will not be broken, as to the cargo, by any transactions at an intermediate port.[8]

This separates the cargo and vessel and considers intention in relation to the ultimate destination of the cargo.

Much difference of opinion was later called forth by the decision of the Supreme Court of the United States in 1866 by which the cargo of *The Springbok*, which had sailed from London to Nassau, was condemned though the vessel was seized when sailing between two neutral ports. The vessel itself was released. In this case the court said:

> Upon the whole case we cannot doubt that the cargo was originally shipped with the intent to violate the blockade; that the owners of the cargo intended that it should be trans-shipped at Nassau into some vessel more likely to succeed in reaching a blockaded port than *The Springbok;* that the voyage from London to the blockaded port was, as to the cargo, both in law and in intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of the voyage, attached to the cargo from the time of sailing.[9]

Writing after, but speaking of the period just before, the American Civil War, Sir Travers Twiss, agreeing with the law officers of the Crown, as to the case of *The Springbok*, said:

> Great Britain and the United States of America had, until then, been content to enforce against neutral merchants the confiscation of their property upon proof of some *constructive attempt* on their part to violate a blockade; it has remained for the younger sister, under her extraordinary difficulties, to initiate the doctrine of a *prospective intention*, on the part of a neutral merchant, to violate a blockade, and to subject him to the confiscation of his property not upon the *evidence* of

[7] 2 Wall. 135. [8] 3 Wall. 514. [9] 5 Wall. 1.

> any present voyage of the ship and cargo, in which the ship and cargo have been intercepted, but upon the *presumption* of a future voyage of the cargo alone to a blockaded port, after it had been landed from the ship at a neutral port.[10]

Many British authorities, as well as many continental writers, regarded the decision in the case of *The Springbok* as unsound. A formal statement in 1882, with the names of such distinguished members of the Institute of International Law as Arntz, Asser, Bulmerincq, Gessner, Hall, De Martens, Pierantoni, Renault, Rolin, Travers, Twiss, pronounced *The Springbok* decision

> subversive of an established rule of maritime warfare . . . that it is extremely desirable that the Government of the United States of America, which has been on several occasions the zealous promoter of important amendments of the rules of maritime warfare, in the interests of neutrals, should take an early opportunity of declaring, in such form as it may see fit, that it does not intend to incorporate the above-propounded theory into its system of maritime prize law, and that the condemnation of the cargo of *The Springbok* shall not be adopted as a precedent by its prize courts.

Such a declaration was never made by the United States.

The Institute of International Law in 1882 included in the Regulations Concerning Prizes, Article 44, a provision that: "In no case can the doctrine of continuous voyage justify condemnation for violation of blockade." In 1896, however, the Institute said of contraband: "Destination for the enemy is presumed when the shipment goes to one of the enemy's ports, or even to a neutral port which, from clear evidence or undeniable fact, is only a temporary stopping place in a commercial transaction having an enemy end."[11]

Hall, the English authority, writing of the American extension of the doctrine of continuous voyage, said in 1884, maintaining his early position: "The American decisions have been universally reprobated outside the United States, and would probably now find no defenders in their own country."

The British Admiralty *Manual of Naval Prize Law*, 1888, stated:

> 71. The ostensible destination of the vessel is sometimes a neutral port, while she in reality intended, after touching and even landing and colorably delivering over her cargo there, to proceed with the same cargo to an enemy port. In such a case the voyage is held to be "Continuous" and the destination is held to be hostile throughout.

In paragraph 73 of this Manual, it was held, as to the cargo, that if the destination of the vessel on board of which the cargo was should be neutral, then the "destination of the goods should be considered neutral" even if the goods have apparently an ulterior hostile destination.

[10] "Continuous Voyage," 3 *Law Mag. & Rev.* 4th series, p. 1.
[11] *Annuaire*, 1896, p. 231.

When this last principal was put to the test through German shipments of goods to a Portuguese port near the South-African Republic, during the South-African War in 1900, Lord Salisbury speaking for Great Britain, took a position similar to that which had been taken by the United States in the case of *The Springbok;* that exemption cannot apply "to contraband of war on board of a neutral vessel if such contraband was at the time of seizure consigned or intended to be delivered to an agent of the enemy at a neutral port, or, in fact, destined for the enemy's country," and that the destination of the vessel was not conclusive as to the destination of the goods.

In the *Report of the British Royal Commission on Supply of Food and Raw Material in the Time of War, 1905*, the doctrine of continuous voyage is stated as follows:

> Goods, moreover, whatever may be their intrinsic character, are not contraband unless they have a belligerent destination, but there has been, during the last half-century, much discussion as to the evidence necessary to establish the fact that goods are intended for the enemy's use. If the destination of the ship carrying the goods is an enemy's port, this is held to be conclusive evidence as against absolutely contraband goods, but to exonerate the goods, it is not sufficient to show that the ostensible destination of the ship is a neutral port. If after touching and even landing and colorably delivering her cargo at such a port, she is in reality intended to proceed with the same cargo to an enemy's port, the voyage is held to be "continuous" and the destination to be hostile throughout. Moreover, even when the destination of the ship is *bona fide* a neutral port, it does not follow that she is not engaged in the carriage of contraband, should it appear that the goods in question have an ulterior destination, to be attained by transshipment, over land conveyance, or otherwise, for the use of the enemy. In case of goods *ancipitis usus* the requirements as to destination are stricter, and to render such articles confiscable by a belligerent it is necessary to show that they are intended to reach a port of naval or military equipment belonging to the enemy, or occupied by the enemy's naval or military forces, for the enemy's fleet at sea, or for the relief by a port besieged by such belligerent.[12]

In the invitation to the International Naval Conference which drew up the Declaration of London in 1908–09, Sir Edward Grey suggested as one of the questions for the conference "The doctrine of continuous voyage in respect both of contraband and of blockade." The question gave rise to divergent views, as is evident in the report of the British Delegation to Sir Edward Grey on March 1, 1909, in which the delegation says of continuous voyage:

> As the Powers by whose prize court the doctrine has always been upheld and applied were naturally reluctant to renounce a right which they claim to be founded in logic and justice, and as, on the other hand, its abandonment was made a vital issue by those who refused to acknowl-

[12] Vol. 1, p. 23, sec. 97.

edge it, there seemed at one time to be a danger of the complete breakdown of the Conference at this point.[13]

Agreement among the ten leading maritime Powers signing the Declaration of London was embodied in Article 30 as follows:

> Absolute contraband is liable to capture if it is shown to be destined to the territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails either transshipment or transport overland.

Of this article the report of the Naval Conference says: "It is the very principle of continuous voyage which as regards absolute contraband is thus established by Article 30."

While the Declaration of London was not ratified by Parliament, the doctrine of continuous voyage did receive some consideration, as is seen in the remarks of Mr. McKinnon Wood on June 28, 1911:

> I come now to the doctrine of continuous voyage upon which we have been attacked. . . . The result of the agreement is very satisfactory. The doctrine is established where it is important, and given up where it is of no practical value. It is agreed in the case of absolute contraband: that is very important to us. . . . It is said that we give an advantage to foreign nations who can bring things in by land. Never was there a more ridiculous argument. It is an advantage you cannot deprive them of.[14]

The Chinese presidential mandate on the observance of neutrality during the European War, issued on August 16, 1914, provided in paragraph 23 that

> Belligerents are not allowed to detain the arms or contraband of war carried by Chinese vessels between Chinese ports or for or from another neutral country. The ordinary commercial goods carried by Chinese vessels and belonging to a belligerent, as well as all goods belonging to China and carried in belligerent vessels, shall be allowed to pass to and fro without let or molestation.

If such trade was *bona fide* between neutrals, the Chinese statement was according to the law as understood at the time when the statement was issued.

On March 12, 1915, the ministers of finance, marine, foreign affairs and war reported to the President of the French Republic that Germany had declared "the waters which encircle northern France and the United Kingdom a military zone, in which all Allied merchant vessels shall be destroyed without regard for the lives of the crew and the noncombatant passengers and in which neutral shipping will be exposed to the same dangers," and that "such pretentions on the part of the enemy give to the Allied Governments the right to respond by preventing every kind of merchandise from reaching

[13] International Naval Conference, Misc. No. 4 (1909) p. 96.
[14] Hansard, Commons V, 27, p. 454.

or leaving Germany." These actions of Germany were declared to be "in violation of the usages of war." Accordingly the President decreed

> Article 1. All goods belonging to the subjects of the German Empire, either shipped from or to Germany and having taken the sea since the promulgation of this present decree, shall be stopped by the cruisers of the Republic.
>
> All territory occupied by the German armed forces is assimilated to Germany territory.
>
> Art. 2. All articles and goods either of German brand or manufacture or made in Germany, the products of German soil, as well as all articles and merchandise, whatsoever the point of departure of which, either direct or in transit, is in German territory, shall be considered as merchandise coming from Germany.
>
> However, the present stipulation shall not apply to articles or merchandise which the subject of a neutral country may prove to have brought lawfully into a neutral country prior to the promulgation of the present decree or of which he may prove that he was in regular and lawful possession prior to said promulgation.
>
> Art. 3. All articles and merchandise whatsoever shipped either direct or in transit to Germany or to a country close to Germany, whenever the documents accompanying said articles or merchandise shall not show proof that their ultimate and true destination is in a neutral country, shall be considered as merchandise destined for Germany.

British Orders in Council of March 11, 1915 were to like intent.

Portugal in the decree relating to contraband of August 14, 1916, provided:

> Article 4. Goods are considered as directly destined to enemy territory:
>
> (a) When they are destined to neutral ports, but consigned to the enemy or their allies, to their agents or recognized intermediaries, or to persons acting under their orders or directions or who may be under their influence.
>
> (b) When they are destined to neutral ports, not comprised in the preceding sub-clause, but whose final destination to enemy territory may be deduced from the evident deviation from her normal course of the conveying vessel or when it is proved by any other means.
>
> The conveyance of goods to a country adjacent to enemy territory or from which it is notorious that the latter obtains supplies of merchandise which the importing country in question has already imported in quantities exceeding its highest imports for the last three years, shall be considered as a well-founded assurance of the above enemy destination.

Later, February 16, 1917, a British Order in Council went even further in interfering with neutral commerce as a means of retaliation against Germany and directed

> for this purpose to subject to capture and condemnation vessels carrying goods with an enemy destination or of enemy origin unless they afford

unto the forces of His Majesty and his allies ample opportunity of examining their cargoes, and also to subject such goods to condemnation;

His Majesty is therefore pleased, by and with the advice of his Privy Council, to order, and it is hereby ordered, that the following directions shall be observed in respect of all vessels which sail from their port of departure after the date of this order:

1. A vessel which is encountered at sea on her way to or from a port in a neutral country affording means of access to the enemy territory without calling at a port in British or allied territory shall, until the contrary is established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and shall be brought in for examination, and, if necessary, for adjudication before the prize court.

2. Any vessel carrying goods with an enemy destination, or of enemy origin, shall be liable to capture and condemnation in respect of the carriage of such goods; provided that, in the case of any vessel which calls at an appointed British or allied port for the examination of her cargo, no sentence of condemnation shall be pronounced in respect only of the carriage of goods of enemy origin or destination, and no such presumption as is laid down in Article 1 shall arise.

3. Goods which are found on examination of any vessel to be goods of enemy origin or of enemy destination shall be liable to condemnation.

The conveyance of goods to a country adjacent to enemy territory or from which it is notorious that the latter obtains supplies of merchandise which the importing country in question has already imported in quantities exceeding its highest imports for the last three years, shall be considered as a well-founded assurance of the above enemy destination.

The official British *Report on the Administration of the Blockade* states: "Broadly speaking, it may be said that by December, 1916, all or almost all, the oversea trade of Germany had been stopped." After admitting a little leakage from border states, this report further says: "Beyond this the main preoccupation of the Ministry of Blockade has been directed to diminishing the trade between the border neutrals and Germany." This policy was said to have had encouraging results, though some foodstuffs continued to go to Germany. The report declares that neutral shipping "was largely interfered with" and that "a large number of agreements had been made with shipping lines and shipowners under which they brought their ships into a British port for examination, while such vessels as were not under agreement to call were sent in by our naval patrols." The report also maintains that the effect of the Blockade Order in Council of February 16, 1917,

> was to make vessels trading to and from neutral ports in Europe liable to the risk of capture and condemnation if they were found attempting to evade calling for examination at a British port; and, in the second place, it was announced through the public press that neutral vessels would, on certain conditions, be allowed the privilege of calling for examination at certain British ports outside the United Kingdom, such as Halifax in Nova Scotia instead of at Kirkwall, and that British bunker coal would only be allowed to those neutral vessels which under-

took to call at an appointed British port and performed certain services in return.

Later the same report says:

> This method of stopping the export trade to Germany of home produce from the border neutrals is, strictly speaking, not a blockade measure at all, but the exercise of the sovereign rights of the Allied and co-belligerent states to impose conditions upon their trade with border neutrals. The process belongs juridically to the category of commercial treaties rather than that of blockade or the like; but in substance the effect is the same as that aimed at by the blockade, namely, the cutting off of our enemies from all external trade.

From the outbreak of war in 1914 new restraints began to be imposed on commerce. The United States in a communication to the British Government on December 26, 1914, said that it "viewed with concern . . . a course of action which denied to neutral commerce the freedom to which it was entitled by the laws of nations," mentioning among other matters that: "articles listed as absolute contraband, shipped from the United States and consigned to neutral countries, have been seized and detained on the ground that the countries to which they were destined have not prohibited the exportation of such articles." This is a new obligation upon the receiving neutral. Of articles included under the formerly recognized category of conditional contraband, this note says:

> It also appears that cargoes of this character have been seized by the British authorities because of a belief that, though not originally so intended by the shippers, they will ultimately reach the territories of the enemies of Great Britain. Yet this belief is frequently reduced to a mere fear in view of the embargoes which have been decreed by the neutral countries to which they are destined, on the articles composing the cargoes.

A preliminary reply to the United States complaint on January 7, 1915, indicated that Great Britain would interfere with neutral commerce "only to the extent to which this is necessary." The fuller British note of January 10, 1915, announces the abolition of the distinction between absolute and conditional contraband as regards continuous voyage, and the imposition of "somewhat drastic conditions as to the burden of proof of the guilt or innocence of the shipment." In this note the burden of proof is shifted to the neutral.

In closing this note, Sir Edward Grey makes a suggestive statement, the dangerous application of which seems not to have been fully realized by the United States till later. He said "It is impossible for one belligerent to depart from rules and precedents and for the other to remain bound by them." Retaliatory measures were herein foreshadowed, and both belligerents interfered with neutral rights to such an extent that vigorous protests were made. Each replied to the effect that extreme action was due to

disregard by the other "of the recognized rules and principles of civilized warfare" and that a reshaping of old rules was necessary. The British note of July 4, 1915, states briefly "the purpose of the measures we are taking is to intercept commerce on its way from and to the enemy country." The early ideas of continuous voyage, as well as the later embodied in the Declaration of London and proposed codes, were disregarded, and continuous voyage was applied not merely to absolute and conditional contraband and to blockade, as earlier understood, but to the more recent forms of so-called blockade, and not merely to goods bound to the belligerent, but to goods of belligerent origin.

It is evident that the views on the principle involved in the doctrine of continuous voyage have been divergent for more than two hundred and fifty years. These views have been particularly varied since the American Civil War. One principle has from the beginning come to be more and more clear, *viz.*, that the true destination determines the treatment of vessel or cargo. Less and less objection has been raised, as the years have passed, to the application of this principle. There is a demand for a clear regulation in place of the previously evolved "juridical niceties." Such a regulation stripped of all verbiage would seem to be, in brief, "Outside of neutral jurisdiction the true destination of vessel or goods will determine their treatment."

President ROOT. That closes the exercises of the morning.

The Executive Council will meet at No. 2 Jackson Place at half past two this afternoon.

The Society will meet in this room this evening at half past eight, when there will be discussions upon "International criminal jurisdiction," "The status of international cables in war and peace," and "The international regulation of aerial navigation."

The meeting of the morning is now adjourned.

(Thereupon, at 12 o'clock noon, the meeting adjourned.)

MEETING OF THE EXECUTIVE COUNCIL

Thursday, April 28, 1921, 2.30 o'clock p.m.

Pursuant to the call of the Chairman, the Executive Council of the American Society of International Law met at No. 2 Jackson Place, Washington, D. C., at 2.30 o'clock, p. m. The Chairman, Honorable Oscar S. Straus, presided.

Present:

Hon. Chandler P. Anderson	Prof. John H. Latané
Mr. Charles Henry Butler	Mr. Breckinridge Long
Mr. Frederic R. Coudert	Mr. Frank C. Partridge
Mr. Charles Noble Gregory	Mr. Jackson H. Ralston
Prof. Amos S. Hershey	Hon. Elihu Root
Dr. David Jayne Hill	Mr. James Brown Scott
Mr. Charles Cheney Hyde	Admiral Charles H. Stockton
Mr. George W. Kirchwey	Hon. Oscar S. Straus
Hon. Robert Lansing	Prof. George G. Wilson

Mr. Lester H. Woolsey

Mr. George A. Finch, Assistant Secretary, was also in attendance.

The reading of the minutes of November 13, 1920, was, upon motion, dispensed with, and they were approved as printed in the Proceedings.

The following Treasurer's report for the year January 1 to December 31, 1920, was submitted by Mr. CHANDLER P. ANDERSON:

TREASURER'S REPORT

JANUARY 1 TO DECEMBER 31, 1920

INVESTMENT STATEMENT OF LIFE MEMBERSHIP DUES

RECEIPTS

Life membership dues, 29 life members at $100 each			$2,900.00
	INVESTMENTS		
June 23, 1906.	1 $500 Central Pacific first mortgage 4% bond at 102 with commissions	$510.63	
Dec. 21, 1906.	1 $500 Central Pacific first mortgage 4% bond at 100½ with commissions	503.73	
Nov. 14, 1907.	1 $500 Central Pacific first mortgage 4% bond at 90 with commissions	451.08	
July 2, 1908.	1 $500 Central Pacific first mortgage 4% bond at 97½ with commissions	486.75	
Mar. 13, 1917.	1 $500 Central Pacific first mortgage 4% bond at 90 with commissions	452.95	
			$2,405.14
Dec. 31, 1920.	Balance on deposit at Riggs National Bank		$494.86

INVESTMENT FROM INCOME ACCOUNT

May, 1918.	$5000 U. S. Third Liberty Loan Bonds 4¼%.....	$5,000.00

PRINCIPAL ACCOUNT

Jan. 1, 1920.	Balance on deposit at Riggs National Bank.....	$494.86

INCOME ACCOUNT

Receipts

Balance on deposit at Union Trust Company, carried forward from previous account.....		$1,780.10
Balance on deposit at Riggs National Bank, carried forward from previous account.....		5,022.53
Annual Dues:		
1907–18.....	$45.00	
1919.....	318.46	
1920.....	4,175.00	
1921.....	65.50	
		4,603.96
Foreign postage.....		54.61
Exchange on checks.....		.52
Income from investment of life membership dues (5 Central Pacific R. R. Co. $500 4% bonds).....		100.00
Spanish edition of American Journal of International Law.....		2,005.00
Annual Proceedings, 1920.....		928.08
Annual Proceedings, 1921.....		10.50
Annual Proceedings, previous years.....		4.55
Subscription to Journal (transferred Oxford Press).....		4.00
Special Supplement.....		4.50
Interest:		
Riggs National Bank.....	$84.24	
Union Trust Company.....	53.79	
Coupons $5,000 Third Liberty Loan.....	212.50	
		350.53
		$14,868.88

Disbursements

Salary account:			
George A. Finch, Secretary of Board of Editors and Business Manager.....		$1,600.00	
H. K. Thompson, Assistant to Treasurer.....		325.00	
Account clerical assistance:			
Wilbur S. Finch.....	$150.00		
Esther O'Connor.....	65.00		
Minnie J. Robinson.....	380.00		
Josephine M. Xanten.....	200.00		
		795.00	
			$2,720.00
Secretary's disbursements:			
Postage, telegrams, express, etc.....			41.90
Treasurer's disbursements:			
Postage, telegrams, express, etc.....			19.69
Stationery:			
Byron S. Adams.....	$113.75		
Globe Wernicke Co.....	3.50		
			117.25
Annual Meeting:			
James R. Wick.....			82.00
Subscription to Journal (transferred to Oxford Press).....			4.00
Carried forward.....			$2,984.84 $14,868.88

Forward			$2,984.84	$14,868.88

DISBURSEMENTS—*Continued*

Advertising account:				
Printing—Kuehn Bros. & Co.	$417.95			
American Bar Association—list	2.00			
Check list, Rose MacFarlane	2.50			
			422.45	
Journal:				
Oxford University Press, publishing journals for 1917, 1918 and 1919		$5,012.52		
Baker, Voorhis & Co. (copies of previous numbers)		10.37		
		$5,022.89		
Preparation:				
Wilbur S. Finch	$90.00			
Kathryn Sellers	25.00			
Clarence E. Davis	6.00			
J. V. O'Hare	16.38			
		137.38		
			5,160.27	
Furniture account:				
H. F. Warneson & Co., bookbinding	$175.75			
University Book Bindery, bookbinding	17.50			
J. of Amer. Inst. of Criminal Law and Criminology	2.70			
North American Review	6.10			
			202.05	
				8,769.61
				$6,099.27
Temporary investment:				
$2,500 5½% U. S. Certificates due June 15, 1921				2,500.00
				$3,599.27
Dec. 31, 1920. Balance at Union Trust Company			$1,833.89	
Dec. 31, 1920. Balance at Riggs National Bank			1,765.38	
				$3,599.27

NOTE: Account of Oxford University Press for publishing the 1920 Journal to be paid in 1921.

ASSETS.	December 31, 1920.
5 Central Pacific R. R. 5% first mortgage bonds (cost price)	$2,405.14
$5,000 U. S. Third Liberty Loan, 4¼% bonds (cost price)	5,000.00
$2,500 U. S. 5½% Certificate due June 15, 1921	2,500.00
Riggs National Bank:	
Principal account $494.86	
Income account 1,765.38	
	2,260.24
Union Trust Company	1,833.89
	$13,999.27

Accounts payable:
Oxford University Press for publishing 1921 Journal.
Accounts receivable:
Unpaid membership dues. (Estimated about 150 will pay in subsequent years.)

The report was received and referred to the Auditing Committee.

The Recording Secretary, Mr. JAMES BROWN SCOTT, stated that he had nothing of importance to report in addition to the report which he rendered to the Executive Council at its meeting on November 13th last.

He submitted an application for life membership from Dr. Henriquez y Carvajal, former President of Santo Domingo, accompanied by the required membership fee. Upon motion duly made and seconded, Dr. Henriquez y Carvajal was unanimously elected to life membership.

As Editor-in-Chief, Mr. SCOTT reported that the Journal had been issued regularly and on time during the preceding year, and that the members of the Editorial Board had cooperated in this happy result. He also expressed appreciation of the services of the Secretary of the Board.

He further reported that the Proceedings of the Executive Council of November 13th had been published, as directed by the Council, and distributed in bound form to all members of the Society who had subscribed. Finally, he reported that the Cumulative Index to the Society's publications from the beginning up to the end of the year 1920 had been completed by Mr. Finch, was in course of publication, and was expected to appear within a month or six weeks.

Professor GEORGE G. WILSON, Chairman of the Committee on Honorary Members, reported that it seemed inexpedient, owing to present conditions in the world, for the Society to put its stamp of approval upon any particular man, by electing him to honorary membership, until conditions of peace are restored.

The appointment of a Committee on Nominations for officers was next in order. Before proceeding to the appointment of the members of the Committee, the RECORDING SECRETARY explained that, owing to the omission of the meetings of the Society in the years 1918, 1919, and 1920, all officers and members of the Executive Council elected by the Society were holding over *ad interim* and it would be necessary to elect their successors at the present meeting of the Society.

The CHAIRMAN was thereupon, upon motion duly made and seconded, authorized to appoint a Committee on Nominations, of five members, to report to the meeting of the Society on Saturday morning, April 30th.

Mr. SCOTT further suggested that the meetings of the Executive Council held in lieu of the meetings of the Society during the three preceding years, had proved so valuable in the discussion of the subject in which the Society is interested and in planning the work of the Society, that it might be advisable to continue such meetings during the intervals between annual meetings of the Society and to have the Council report its proceedings at such meetings to the Society at each annual meeting. After considerable discussion, it was decided not to take any formal action, but to bear the suggestion in mind in the nomination of new members of the Council.

Professor GEORGE G. WILSON suggested the desirability of placing an interval between the successive periods of service of the different classes of membership in the Executive Council. He thought that at least a period of a year should elapse after a member is retired from the Council before he should be eligible for reelection. The suggestion met with the unanimous

approval of the members of the Council, and the proper method of carrying it into effect was discussed at length. It developed that such a provision would require an amendment of the constitution and that, therefore, it would be impossible to adopt it at the present meeting of the Society. It also seemed undesirable that such an amendment should operate to require a change in the personnel of the permanent administrative officers who carry on the Society's work in detail and who are now elected by the Executive Council from among its members.

At the conclusion of the discussion, Mr. ROBERT LANSING moved that the following sentence be added to the first paragraph of Article 4 of the constitution: "No elected member of the Executive Council shall be eligible for reelection until the second annual meeting after the expiration of his term of office."

Mr. ELIHU ROOT then moved that the second paragraph of Article 4 of the constitution be amended to read as follows:

> "The Recording Secretary, the Corresponding Secretary, and the Treasurer shall be elected by the Executive Council, and shall, during their terms of office, be *ex officio* members thereof."

Upon motion then duly made and seconded, both proposed amendments of the constitution were referred to the Executive Committee, with power to redraft Article 4 so as to carry out the intentions of the Executive Council, and to notify the proposed amendment to the members of the Society for consideration and action at the next annual meeting.

Miscellaneous business was then in order.

The Corresponding Secretary, Mr. CHARLES HENRY BUTLER, presented a letter of April 20, 1921, from Mr. Francis B. James, Chairman of the Committee of Commerce, Trade and Commercial Law, of the American Bar Association, calling attention to a public meeting of that committee in New York City, May 2–4, 1921, and inviting the members of the Society to attend. The Council directed that the notice and invitation be read to the members of the Society at a public session.

The Recording Secretary, Mr. JAMES BROWN SCOTT, laid before the Council a circular describing the Institute of Politics to be held at Williams College in July and August next, and Mr. BUTLER, the Corresponding Secretary, conveyed an oral invitation from President Harry A. Garfield, of Williams College, to the members of the Executive Council to attend these lectures. After consideration, the following resolution was adopted:

> Resolved that the Executive Council of the American Society of International Law appreciates and thanks the Institute of Politics for its polite invitation to attend the first session of the Institute, to be held at Williamstown in July and August of the present year, and assures the Institute of its great interest in the work which is proposed.

The Assistant Secretary was requested to obtain a sufficient number of circulars describing the Institute, and send one to each member of the Council.

Mr. GEORGE A. FINCH, the Assistant Secretary, reported that representatives of the press had inquired if any arrangements would be made to enable them to report the speeches at the Society's annual banquet, and he inquired if the practice followed heretofore of excluding newspaper men from the banquet would prevail. After discussion, the Executive Council directed that seats be provided after the dinner for the representatives of the local papers and the press associations.

Whereupon, the Executive Council, at 4.15 o'clock p.m., adjourned until Saturday, April 30th, immediately after the adjournment of the Society.

OSCAR S. STRAUS,
Chairman.

JAMES BROWN SCOTT,
Recording Secretary.

THIRD SESSION

Thursday, April 28, 1921, 8.30 o'clock p.m.

The Society met at 8.30 o'clock p. m., Hon. Elihu Root presiding.

President ROOT. The first exercise of the evening will be an address upon "International criminal jurisdiction," as illustrative of the work of Subcommittee No. 4, which was charged to consider the subjects not now adequately regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted.

This address will be made by Mr. Jesse S. Reeves, Professor of Political Science in the University of Michigan.

INTERNATIONAL CRIMINAL JURISDICTION

ADDRESS BY JESSE S. REEVES

Professor of Political Science in the University of Michigan

I

A full consideration of the topic assigned to me should include (1) criminal jurisdiction *ad hoc* sought to be erected by the peace treaties; (2) jurisdiction over war crimes committed in the future; and (3) jurisdiction over crimes of international concern in time of peace. The first leads us directly into matters essentially controversial, in which one's point of view can scarcely fail to be determined by his traditional attitude, not only toward the nature of crime and its punishment, but as to "due process of law." There is a natural reaction against *ex post facto* crimes and punishments, as well as against bills of attainder. We are apt to be under the limitations moral, if not legal, of preconceived notions of abstract justice with reference to the will and policy of the victor.

As to the second, the Paris Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties came to the conclusion that it was "desirable that for the future penal sanctions should be provided for such great outrages (as acts which brought about the war and which accompanied its inception, particularly the violation of the neutrality of Belgium and Luxemburg) against the elementary principles of international law." The American members of this commission were in substantial accord with the recommendation.

They believe that any nation going to war assumes a grave responsibility, and that a nation engaging in a war of aggression commits a

crime. They hold that the neutrality of nations should be observed, especially when it is guaranteed by a treaty to which the nations violating it are parties, and that the plighted word and good faith of nations should be observed in this as in all other respects. At the same time, given the difficulty of determining whether an act is in reality one of aggression or of defense, and given also the difficulty of framing penal sanctions, where the consequences are so great and may be so great as to be incalculable, they hesitate as to the feasibility of this conclusion, from which, however, they are unwilling to dissent.

This opinion commends itself in many ways. Those acts which are against the fundamental principles of international law are the very ones which, singly or associated with matters of morally indefensible state policy, give rise to war, or which accompany the prosecution of hostilities. Unless war is abolished (in which case there would be no effectual violation of these elementary principles, but merely attempts to do so), the ultimate decision of these matters would continue to be made by force of arms. Unfortunately, not in every war does victory side with justice. No legal structure can be erected upon such an erroneous foundation. To provide a scheme by which the victor could, in forms of law, punish his victim by alleging and proving to his own satisfaction the commission of such acts, would certainly not make for the strengthening of international law, but for its weakening. Better is it to be perfectly frank, and let the victor mete out to the victim punishments *ex post facto* as a part of conquest than to attempt to give legal form and direction to such proceedings. In the future, as in the past, the ultimate restraints upon belligerents are apt to be their own self-limitations, the fear of reprisals, and the moral reprobation of mankind. In this connection one is reminded of the long discussions upon this question which have engaged the attention of the Institute of International Law. In 1875 the Institute considered the Declaration of Brussels of the year preceding and adhered to the suggestion made by General Arnaudeau at the Conference of 1874 "in favor of an agreement among the Powers to establish similarity in the methods of restraint at present provided in their military codes, and to seek some basis for an agreement in the penalties for crimes, torts, and infractions against international law (Criminal Law of War)." The code of laws and customs of war on land proposed by the Institute in 1880 contained a provision for penal sanctions for violations of the law of war: "Article 84. Offenses against the laws of war are liable to the punishments specified in the penal law." The official commentary upon this article states, however, that "this mode of repression is only applicable when the person of the offender can be secured. In the contrary case, the criminal law is powerless, and, if the injured party deem the misdeed so serious in character as to make it necessary to recall the enemy to a respect for law, no other recourse than a resort to reprisals remains."

The idea that reprisals "recall to a respect for law" is one of those

romantic notions which the past war ought to have effectually dispelled. On the contrary, illegality countered with reprisals leads to additional illegality with new reprisals, until (if we adhere to the legality of reprisals) distinction is difficult to be drawn between the acts which are legal and those which are not. The suggestion is made in passing that "war law" falls far short of law in its very nature, a misconception based upon the idea that war is a species of litigation. Litigation is a form of conflict, but the special form of conflict known as war is certainly not litigation. Yet this idea has gripped many who have pinned their faith to the so-called codes of war-law.

Punishment of war crimes (except when the offender is lucky enough during the war or strong enough after it) is part of a generally romantic attitude toward the world, which seeks to provide a rule of action based upon the theory that the defeated party to a war is he who unjustly brought it on, and that he alone commits atrocities during it. *Securus judicat orbis terrarum*, which being translated means that "nothing succeeds like success." If the offender be the victor (the victor would never admit the offense), who would be the prosecutor? Who the judge? How would the penalties be inflicted? One may say that these fall within the range of the body of neutrals. But we have been told upon high authority that hereafter there will be no neutrals. That was, however, based upon the assumption that there will be no belligerents, because no wars; or else that hereafter no war can be limited in area, but every war will be in a sense a world war.

We are forced to take our notions of crime from that body of law which has furnished the conception of crime. Crime is a conception of comparatively late development in municipal law. Not until centralized machinery of justice has been developed within the state does crime in a legal sense exist. Acts of violence by an individual against another only gradually became public by being an offence against the king's peace, and thereafter against society organized under government in the state. One state may act toward another to excite moral reprobation, yet from a legal point of view crimes are impossible by one state against another. All authorities agree that a state as such cannot commit a crime. "An international delinquency," says Oppenheim (Vol. I, 209) "is not a crime, because the delinquent state, as a sovereign, can not be punished, although compulsion may be exercised to procure a reparation of the wrong done." In so far as the relations of state with state are legal, an act may violate a legal right or duty, but it resembles tort and not crime.

My conclusions with reference to war crimes may therefore be summarized as follows:

1. As to those charged as having been committed during the past war, policy and not law determines the matter, for the peace terms of the victor, dictated and not negotiated, are under no limitations that can be called legal. The Treaty of Versailles was a treaty actually built upon capitula-

tion, whatever the vanquished may have believed, or were led to believe. The restraints of the victor as regards the vanquished were not legal restraints. They were those of policy, and policy has regard to the vague inhibitions summed up, with no complete agreement, as justice or the principles of humanity. A treaty of peace usually carries with it amnesty, either expressed or implied. The Treaty of Versailles expressly rejects amnesty and substitutes retribution. Why seek to found a legal system upon it?

2. As to crimes committed in future wars, one is forced back upon the confession of inability made by the Institute of International Law in 1880. Punishment for violations of the code of war is predicated upon physical possession of the culprit. It can easily be had when the offender is a part of the state's forces, not of its enemy's. Such punishment is provided for by military law. Where the offender is of the enemy's forces, an altogether different situation is presented. To what extent may the doctrine of *respondeat superior* be imputed? What about ultimate culpability? Or of failure to prevent war crimes? It would seem as if all of these matters must be provided for in the treaty of peace following a war. The extent of punishment will depend upon the nature of victory and defeat,—matters ultimately determining the settlement. It is conceivable that a war limited in area might come to a different conclusion as the result of external pressure. But the settlement so made would be no less political than the former. Protection against the performance of war crimes in the future rests with the organized solidarity of the civilized world, working through the League of Nations or through some similar association or society having the same ends under a different name, so that preponderant force will always be against the aggressor. By aggressor is meant not necessarily the violator of a technical international right, but the state which resorts to war as against the organized opinion of the world. In doing so it violates in the largest sense "the peace of the world." It has no legal status. It is an outlaw.

II

The Advisory Committee of Jurists which drew up the plan for a Permanent Court of International Justice, in addition thereto prepared certain resolutions which were transmitted last fall to the Council and Assembly of the League of Nations. The second of these suggested the establishment of a High Court of International Justice, separate and distinct from the Permanent Court of International Justice in organization and jurisdiction. As to organization, the High Court was to be composed of one member for each state, to be chosen by the group of delegates from each state represented in the Court of Arbitration.

> Article 3. The High Court of Justice shall be competent to try crimes against international public order and the universal law of

nations, which shall be referred to it by the Assembly or by the Council of the League of Nations.

Article 4. The Court shall have power to define the nature of the crime, to fix the penalty, and to prescribe the appropriate means of carrying out the judgment. It shall formulate its own rules of procedure.

The Council of the League, in submitting the "recommendation" of the committee to the Assembly, suggested that the plan be placed for consideration before certain bodies of specialists in international law, the American Institute of International Law among the number.

> These associations would then have to give preliminary replies to the two questions as to whether a High Court of Justice should be established with the objects, the jurisdiction and the organization laid down in the draft contained in the second recommendation, and, if so, whether this should be a special court, or if jurisdiction in criminal matters should be entrusted to the Permanent Court of International Justice provided for in Article 14 of the Covenant. The preliminary replies of the international associations should then be submitted by the Council to the governments of the states members of the League of Nations.

This resolution was referred by the Assembly to a committee (No. 3), which declined to adopt the "recommendation."

The plan of the Permanent Court of International Justice contains no provision for criminal jurisdiction, and the supplementary proposition for a special court having been "dished," the present organization of the world provides for no such judicial machinery further than that provided under the Treaty of Versailles for the trial of war crimes. Nevertheless, the matter of an international penal jurisdiction comes before us "as a matter not now adequately regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted."

Not forgetful of the eminent learning and skill of those who composed the Hague Committee on the plan for a Permanent Court of Justice, and paying tribute to them for the execution of an extremely difficult task in drafting the plan, one cannot refrain from expressing surprise at the extraordinary range of power with which it was proposed to clothe the High Court of International Justice. In the first place, it was to be competent to try "crimes against international public order, which shall be referred to it by the Assembly or by the Council of the League of Nations." This might and probably did mean simply that the League might turn over to this special court for trial all or a portion of those charged with war crimes under the treaties of peace, and that when this function was performed, the High Court would become *functus officio*. Otherwise, if it were to be a permanent criminal court, it could act only after the Council or Assembly had decided

that a case should be brought to trial by the court. Thus the Council and the Assembly or its agencies would function as an inquisition, or *juge d'instruction*, or as a district attorney's office to prepare information. Such an idea is absurd, and one is thrown back upon the previous suggestion that it was intended to be a special court for the trial of crimes already committed under Article 228 of the Treaty of Versailles. The treaties with Austria (Article 173) and with Hungary (Article 157) provide for the trial of war crimes before military tribunals only. What are crimes "against international public order and the universal law of nations?" This is a question not yet answered, but which the proposed court would have power to answer: "The court shall have power to define the nature of the crime (*un pouvoir appréciateur pour caracteriser le delit*), fix the penalty, and prescribe the appropriate means of carrying out the judgment." The world is under obligation to Committee No. 3 of the Assembly of the League of Nations for its successful opposition to a plan which would have created a travesty upon a court. Again, it is better to proceed frankly under the supposed right of the victor against the conquered to punish according to the will of the victor, than to disguise such acts under the name of a judicial proceeding, where a court defines the crime and prescribes appropriate penalties.

III

Let us pass from these matters of past war crimes to questions of international law that are not so closely associated with the peace settlement and the execution of the will of the victor. The proposed Permanent Court of Justice provides no jurisdiction, criminal or quasi-criminal. Eliminating the possibility of criminal jurisdiction over states, because states are not capable of committing crimes in any legal sense, there remains a very proper basis for jurisdiction over controversies between states arising *ex delicto*, where the basis of the controversy is an act alleged to be criminal performed by a person (natural or artificial) which may give rise to diplomatic reclamation. International criminal law is based upon conflict of laws. It is in this sense that it has long been used and with reference to which there is a large and well considered literature. The names of Kohler, Meili, Niemeyer, Travers, and Adenalfi, at once suggest themselves. It is not private international law, because criminal law is public law, the administration of criminal justice having come to be a state act purely. Therefore international penal law is a conflict of public laws of municipal or state jurisdictions. The controversy over the conflict of criminal laws is one of pure international law; it is a matter involving the reciprocal acts and obligations of state and state. It would seem, therefore, that such controversies are not only justiciable but within the proper jurisdiction of the proposed Permanent Court of International Justice. As modified by the League of Nations Assembly, the jurisdiction of the court is to "comprise all cases which the parties refer

to it and all matters specially provided for in the treaties or conventions in force" (Article 36).

The only international crime existing by the customary law of nations is that of piracy; but the term as used means international only in the sense that it is universally recognized and that its punishment rests with no one state. A pirate being denationalized, all states have concurrent jurisdiction over him as an outlaw. Yet even this offense might give rise to diplomatic reclamation. Suppose state A interposes in behalf of X, her alleged national captured by state B and charged with piracy. A simple situation such as this might fall within the jurisdiction of the court in a quasi-penal controversy. It is easy to imagine a case similar to that of Ambrose Light, for instance, falling within the competence of the court. Other offences called international have been made so wholly by treaty. Examples readily occurring have to do with the African slave trade, the white slave traffic, and liquor traffic in the North Sea. In each of these the signatories, following treaty agreement, have put certain acts under the ban of municipal criminal law. In addition, such treaties have usually provided concurrent jurisdiction over the offender, whatever his nationality. There may well be additional international agreements extending the list of offenses against society in its larger sense.

The problem of international penal jurisdiction is to combine conventional agreement upon two fundamentally different subjects. The first, as suggested, is to proceed along the lines of the white slave traffic convention so as to provide a list of offenses of international significance and concern, basing jurisdiction wholly upon the place of arrest and custody, thereby eliminating the troublesome factors of *locus* of the crime and the nationality of the offender. It is not likely that the list of such international crimes would become large. Each type of offense would have to be so universally reprobated that the culprit would be considered as an offender against the human race.

The second problem has to do with the divergencies of conflicting municipal penal systems. Because of the radical variation among states as to territorial and non-territorial crimes, it is too much to expect that any state will completely abandon its system or materially modify it with a view to international uniformity. There are, however, areas of conflict within which agreement might seem to be possible. There is, for example, the conflict of territorial and quasi-territorial jurisdiction involved in the matter of offenses committed upon merchant vessels in foreign ports and waters. When, where, and how shall the jurisdiction of the ship's state end, and that of the port's state begin? What are the offenses that disturb the peace and security of the port? With reference to these matters it would seem that an agreement ought to be possible which, without derogating from the authority of either state to any degree, would provide a uniform rule of action. A not dissimilar situation arises as to aircraft. Here

the recent international agreement seems to point the way, at least, to uniformity.

The question of extraterritorial crime,—to what extent should a state assume jurisdiction over offenses committed by aliens abroad—is one which has not yet been solved. The practices growing out of the municipal law vary widely from state to state. There might well be some common factor of uniformity which would furnish a rule of action for states. There are, furthermore, questions associated with extradition, with asylum, with the nature of political offenses, with the international effects of penal sanctions. To rehearse these would be to review the field of international criminal law. What is needed is a series of international agreements, so that the Permanent Court might have a standard of rights and duties of states with reference to their respective penal jurisdictions. Even more important than this, agreements of this kind would eliminate many international differences, and finally they would assist in the development of an important function—that of an international penal administration.

President ROOT. With reference to the action of the Hague Committee of Jurists regarding the International Court of Justice, I would like to state that the committee did not recommend it. The project was submitted to the committee, and, I think, the last day of the session, or the day before, it was brought up by the president, Baron Descamps, of Belgium, but the committee did not consider it or discuss it. They referred it to the Council for consideration without any action on the part of the committee. I doubt if there would have been a single vote in the committee except that of the author of the project in its favor, and I think the committee generally agreed with Professor Reeves' view.

Professor REEVES. I used the word "recommendation" as a quotation; the record used that word in referring to the transmission of the document, which at the time I thought was erroneous, because there was no record that the committee actually adopted it.

President ROOT. There may have been, but the committee scrupulously refrained from any recommendation of that scheme.

The next in the order of exercises is the address on "The status of international cables in war and peace" which will be delivered by Mr. Elihu Root, Jr., a member of the New York Bar.

THE STATUS OF INTERNATIONAL CABLES IN PEACE AND WAR

ADDRESS BY ELIHU ROOT, JR.

Member of the New York Bar

Until the middle of the last century there was no property worth quarreling over, in all the high seas, except ships and their cargoes.

This ceased to be true when in 1851 Crampton laid his cable across the Straits of Dover. Since that time there has been a steady growth of cable mileage, until now we have a vast web of cables covering the terrestrial globe. This web not only represents a great capital investment, but it is an intrinsic part of the world's nervous system, vital to commerce and the mutual comprehension of peoples. The cable web is peculiarly dependent for protection upon a proper development of international law, for it lies in a domain without a sovereign, and there it has to stay, come peace, come war. It can not like shipping change its course or remove itself from the seas and retire to the protection of its own territory.

The law in its growth has not kept pace with the growth of the cables. But it has expanded enough to be hard to compress into a twenty minute speech.

PEACE

(1) OPERATION

The peace-time *operation* of cables is largely governed by the International Telegraph Convention of St. Petersburg as revised in Lisbon in 1908. That convention, with its annexed rules, regulates minutely the *operation* of telegraphs and also of cables. It covers a great variety of matters, from the method of indicating the time of day to the rate between Hedjaz and Yemen. Fifty states, including all the great Powers of the Continent, are parties. But the United States has never signed. That convention is in process of revision, and the question of our signing will be raised again. I believe that all the signatories have state-operated telegraphs. And I believe that, with the possible exception of Great Britain, those telegraphs are less efficient than our own. Their methods of operation should not be imposed upon us. That which our own companies find useful in the St. Petersburg rules, they voluntarily adhere to. What they find oppugnant to efficiency they should not be compelled to adopt. I hope we do not sign.

The failure of the United States to adhere to that convention, however, has left us with one operating problem which will have to be dealt with by international agreement. That is the problem of regulating rates on cables connecting two sovereign states. It is perfectly obvious that both states

can not regulate independently. That would give you inconsistent rate schedules which the companies could not obey.

It seems to me that as far as possible the control of such rates should be left to the state whose citizens own the line in question. It seems to me that the ideal to strive for is a system under which the state whose citizen has built the cable and owns it, shall be allowed to regulate it. It hardly seems just that a state whose capital is not committed to the enterprise should be allowed to say what the return on the investment shall be. Some day the same question may come up in regard to oceanic freight rates, and I think we all have a feeling that in such case it would be preposterous to allow a country not owning the ships to determine what rates should be charged.

(2) PROTECTION

So much for operation. But what about the peace-time protection of cables? The St. Petersburg Convention provides nothing as to this.

Some bloody-minded gentlemen have suggested that this problem might be solved under the pre-existing law of nations by treating those who cut cables as pirates and hanging them to the nearest yard-arm. In fact, Mr. David Dudley Field inserted such a provision in his International Code (1876, Art. 83):

> Every person whosoever, who, without authority from the owner, . . . removes, destroys, disturbs, obstructs, or injures any oceanic telegraphic cable not his own, or any part thereof, or any appurtenance or apparatus therewith connected, or severs any wire thereof, . . . is deemed a pirate.

While that proposal still finds a warm response in the hearts of those officers of cable companies charged with the maintenance of lines, it did not recommend itself to jurists, nor for that matter to seafaring men who looked upon the development of the submarine cable as a trivial but annoying interference with the operation of their trolls and anchors. The first real step toward the solution of the problem was the convention of 1884. All the commercial Powers have adhered to this convention. It provides (Art. II) that whoever voluntarily or negligently cut or injured a cable should be punished, unless his act was done to save his life or his ship.

According to the provisions of this convention, the contracting parties have enacted laws punishing the commission by their citizens of the acts forbidden. The penalties provided are in most cases quite severe. Nevertheless the law works badly. Trolls and anchors continue to foul our cables. Impatient skippers continue to extricate themselves by recourse to the hacksaw and continue to go unpunished.

A revision of the convention is being discussed. I am sure that Mr. Fletcher, who, I think, is now charged for us with the conduct of the negotiation, would be grateful for any ideas promising a solution.

(3) TRANSIT TAXES

There is also a problem in regard to the imposition of transit taxes by states on through telegrams over lines which happen at some point to run through their territorial waters or land on their shores. That kind of tax is very ancient. The unpoetic antiquarian tells us that the Trojan War was really stirred up, not by Helen's holiday, but by the transit taxes which were imposed on caravans traversing the Troad. And the transit tax is widespread among uncivilized peoples. If you want to go peacefully through the country of the Wagogos, you give the chief glass beads and copper wire by way of transit tax. The custom of imposing such taxes appears to have fallen into desuetude and disrepute among the civilized nations, until its reinstitution was invited by the multiplication of telegraphs and submarine cables. If the messages actually pass through a relay station on land, we can not deny the *right*, legally speaking, of the sovereign to tax them; but if the wires and messages merely run through territorial waters, it seems as though the analogy of the rule relating to the taxability of ships in transit should preclude the tax. These taxes, whether legal or not, are destructive and unjust and should be forbidden by international agreement.

WAR

(1) UNNEUTRAL USE OF CABLES

As far as I know, there have been only two great war-time questions relating to cables. The first of these was, how far neutrals were bound to prevent the cables under their control from being used to transmit information to belligerents. That matter has been disposed of, as far as the signatories are concerned, by Articles 8 and 9 of the Convention Concerning the Rights and Duties of Neutral Powers, negotiated at The Hague in 1907. This provides that neutrals need not restrict the transmission of information by telegraph to belligerents, but if they do adopt restrictive measures, those measures must be impartially applied.

(2) THE CUTTING AND DIVERSION OF CABLES

The second war-time question is: What may a belligerent do by way of cutting cables in time of war and what must he do by way of replacement and compensation? That question is of high theoretical interest and of great practical importance.

What have we on this by way of treaty? The Hague Convention of 1907 Respecting the Laws and Customs of War on Land contains, under the title "Military Authority over the *Territory* of a *Hostile State*," the following provisions:

> Article 53. All appliances, whether on land, *at sea*, or in the air, adapted for the *transmission of news*, or for the transport of persons or things, *exclusive of cases governed by naval laws*, depots of arms, and

generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

Article 54. Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except when absolute necessity requires. They must likewise be restored and compensation fixed when peace is made.

I think it is generally agreed that these provisions relate only to the seizure and destruction of cable *within hostile territory*. The title indicates this, the exception of cases covered by naval laws in Art. 53 indicates it, and I think the debates indicate it. This is the only treaty bearing on the question. For the rest, we are thrown back on custom, on the deliberations of the jurists, and to some extent perhaps on the imperfect analogies of the old laws of war at sea.

One thing was considered as settled before the recent war. In 1879 the Institute of International Law resolved: "*II. Le câble telegraphique sous-marin qui unit deux territoires neutres est inviolable.*" That was redeclared by the Institute in 1902 and again in 1913. It was made a part of our Naval War Codes of 1900 and 1917. It has the approval of the publicists,[1] and it has generally been respected in practice by nations at war. In the late war, however, the rule has been infringed.

On the night of November 20–21, 1914, the German-owned cable from the Spanish islands of Madeira to Liberia was cut, it is believed by the British, though Liberia did not enter the war till August 4, 1917.

On September 13, 1915, the German-owned cable from Liberia to Pernambuco in Brazil was cut, though Brazil did not enter the war till October 26, 1917. These actions seem to have proceeded on the theory that, because the cables were of German ownership, they could be cut, irrespective of what points they connected.

This test of the right to cut had been abandoned by general consent before the war. In the words of the Institute resolutions of 1913, "there is no distinction to be made between cables, whether they are government or private property; neither is the nationality of the owners to be taken into account." (Art. 54, C.)

One reason for refusing to apply the ownership test is given clearly by the British jurist Westlake:

A telegraph cable cannot be attached to the shore except by the territorial sovereign or by virtue of a concession from him, granted from public motives and always subject to public control, so that it is a public institution belonging internationally to the state, even although it may in the narrower sense be the property of a company. If the cable connects different states it belongs to both, and if they are respectively

[1] 2 Westlake, p. 116; Scholz, *Krieg und Seekabel*, Sec. 28; Bonfils, Sec. 1278; Pradier-Fodéré, VI, Sec. 1272; T. E. Holland in 25 *Journal de Droit International Public*, 642, 652.

neutral and belligerent it cannot be cut without violence being done to the neutral interest.[2]

In other words, the public interest in the cables so far exceeds that of the owners that for purposes of war-time interruption we should regard the former and not the latter.

Another argument, and one that is conclusive to me, is this. The danger to the belligerent, the urgency of the belligerent's interest in cutting, is the ultimate reason back of the right to cut. That danger and that need are dependent on the nature of the points connected, and not at all on the ownership of the cable. If you undertake to lay down rules which deprive a belligerent of the exercise of powers which may be decisive of the conflict, your law will be broken. If you do not lay down any rules, you will find belligerents inflicting intolerable hardships on neutrals for the sake of very slight advantages to themselves. I think the ideal is to have rules which will not take away from belligerents the exercise of vitally important rights, but which will forbid them to inflict serious injuries on neutrals for the sake of slight advantages. If the cable runs into one of the belligerent countries, no matter who owns it, the other is vitally interested in cutting it. If it runs between distant neutrals, each of those distant neutrals is interested in seeing that it is not cut, and the interest of the belligerent in cutting it is very slight. The test should be location and not ownership. Nevertheless, I understand that the ownership test, based apparently on the imperfect analogy of prize law, was advanced at the Peace Conference as justifying the cutting and diversion of the German cables.

The rule that cables between neutrals are inviolable is a sound one. It has been impaired in authority, and can only be restored to full effectiveness by treaty. It should be re-enacted by international agreement.

One other rule has been announced as settled: "A cable connecting the territories of two belligerents or two parts of the territory of one belligerent may be seized or destroyed everywhere except within the waters of a neutral state." These are the words of a resolution of the Institute of International Law, at its meeting in Oxford in 1913.[3]

This rule in slightly different form was also affirmed by the Institute in 1902, and by our Naval Codes of 1900 and 1917, and has the assent of Oppenheim, Westlake, Scholz, Pradier-Fodéré, Bonfils, and Holland.

Now in November, 1917, while both the United States and Portugal were belligerents, the French cut the already interrupted German cable from New York to the Azores, five miles from our coast, and spliced into the seaward segment a line to the French hut at Manhattan Beach. Whether they were proceeding here again on the theory that the old rules should be disregarded and ownership made the test of the right to cut, or whether they were

[2] 2 Westlake, International Law, p. 116.

[3] Art. 54 C, par. 2, Manual of the Laws of Maritime Warfare.

applying an interpretation of the old rule as to cables between belligerents, I do not know. If the latter, the interpretation was unfortunate.

The expression of the rule just quoted, like most other expressions of the rule, says nothing about who shall be allowed to do the cutting. It is obvious, though, that there must be some limit in this regard. A neutral could not lawfully cut a cable between belligerents. Spain could not lawfully have cut the British cables from Gibraltar to Suez. We could not, before our entry into the war, have cut the British cables from Halifax to England, although they connected belligerent points. How, then, in reason, should our entry into the war *on England's side* give us any greater right to cut those cables? Or how should the rights of France regarding the New York-Azores cable be augmented by the fact that both the United States and Portugal had entered the war on the French side? The rule giving a right to cut cables connecting belligerents at any point except in neutral waters is sound and should be a part of the next general treaty on the subject, *but* the exercise of the right should be expressly restricted to *hostile* belligerents. I will propose a text in a moment.

We have considered the rules concerning cables between belligerents and cables between neutrals. Now let us turn to the case of cables between a belligerent and a neutral.

On this point there has never been any general agreement. Some publicists have denied the right of a belligerent to cut such cables except in the territorial waters of one of the belligerents. Some have added to this the right to cut within the limits of effective blockade. Some have asserted the right to cut such cables anywhere except in neutral waters. The practice of the Allies in the late war and our own practice in the Spanish War indicate adherence to and strongly tend to establish the latter view.

Theoretically, blockade is the closest analogy bearing on our point, and the proposed rule restricting the cutting of cables between neutrals and belligerents to the territorial waters of the belligerents or to the waters within the lines of effective blockade flows most logically from the pre-existing law. This rule has the advantage of saving from removal the great lengths of open sea cable and rendering repair at the close of hostilities easy. It seems to me that an effort should be made to incorporate it in a treaty. But there will be occasions when a belligerent, unable to establish effective blockade and unable to get within three miles of the hostile cable landing, will yet have power to cut in the high seas a neutral-belligerent cable. Under such circumstances, the value of the right to cut outside blockade lines and territorial waters is so great that I do not think the major naval Powers will yield it in convention. Still, the attempt to restrict the right should be made. If it fails and belligerents retain a right to cut neutral-belligerent cables anywhere except in neutral waters, then it should be made clear by convention that the right does not extend to cables between a neutral and a *friendly* belligerent.

Let me propose for criticism these rules:

I. Cutting and Diversion

(1) No state shall, except in its territorial waters, cut any cable unless one end of such cable lands in territory in the possession of a belligerent at war with such state.

(2) Any state may cut or divert any cable connecting points in territory in the possession of states at war with the cutting state, anywhere except in the territorial waters of neutrals.

(3) No state shall cut any cable connecting any point in neutral territory or in territory in the possession of a belligerent friendly to such state with any point in territory in the possession of a belligerent at war with such state, except that it may cut or divert such cables within its own territorial waters or the territorial waters of such hostile belligerent or within the lines of effective blockade established by the cutting state.

[(3) Alternative. Any state may, except in neutral waters, cut any cable connecting any point in neutral territory or in territory in the possession of a belligerent friendly to such state with any point in territory in the possession of a belligerent at war with such state. But no such cable shall be diverted by any state except within the territorial waters of such hostile belligerent.] And no such cable shall be cut after such neutral or such friendly belligerent shall have sealed the cable and while such cable shall remain sealed and inoperative. Any such cable once sealed shall not be unsealed during the continuance of the war.

II. Compensation

Any state cutting or diverting any cable, in accordance with the provisions of this convention, shall, on the termination of the war which justified such cutting, either repair and restore such cable or pay to the owners thereof the cost of repairs and restoration, unless the owner of the cable when cut shall have been in a state at war with the cutting state.

President Root. The last item upon our program for this evening is an address upon "The international regulation of aerial navigation." You see we go up from criminals to cables, and from cables to air. This address will be delivered by Mr. Arthur K. Kuhn, of the New York Bar.

THE INTERNATIONAL REGULATION OF AERIAL NAVIGATION

ADDRESS BY ARTHUR K. KUHN

Member of the New York Bar

1. IN TIME OF WAR

The use of aircraft in warfare did not begin with the World War. Balloons were used to some extent in nearly all wars from the end of the eighteenth century onward, as means of observation and reconnaissance, for signalling and for flight.[1] Mention is also made of occasional attempts to use balloons in order to direct explosives toward the lines of the enemy. An authenticated instance is to be found in the attempt of the Austrians, while besieging Venice in 1849, to direct a large number of small balloons, charged with explosives, against that city.[2]

Airplanes came into use in the Turco-Italian conflict and in the Balkan wars, but not for bombardment, or for combat purposes. A tremendous and rapid advance in the art of building and operating airships and airplanes was made in the few years immediately preceding the recent war and all the belligerents proceeded to apply and develop their use to the fullest extent. Owing to the speed of aircraft, and their ability to navigate at high altitudes over distances not conceived possible before the war, they presented effective means of reconnaissance, especially when employed in connection with advanced photography and radiotelegraphy. As the lifting power of airplanes had rapidly increased, they came to be used also as new engines of destruction for dropping steel arrows, bombs and explosives, over batteries and other formations of the enemy, upon lines of communication, upon stores of munitions and war material.

At the time of the Hague Conferences, the part which aerial navigation was destined to play in warfare was not entirely neglected, though, in the nature of things, it could only have been viewed in prospect. The circular letter sent by the Russian Government, January 11, 1899, summoning the First Conference, contained as its eighth proposal, an agreement "to prohibit the throwing of projectiles or explosives of any kind from balloons, or by any similar means." This proposal, as we know, became effective for a period of five years, but was not renewed by many nations which had originally adhered to the Declaration. As it ceased to be binding in a war in which one of the belligerents was joined by a non-contracting Power, it was, of course, not effective in the late war.

It is a matter which ought to be recorded with peculiar satisfaction at this time, that on March 12, 1908, the Senate of the United States ad-

[1] Nys, *Revue de droit int. et de législation comparée*, 1902, pp. 510–515; Garner, International Law and the World War, I, p. 458.

[2] Nys, *op. cit.* p. 513, citing Banet-Rivet, *l'Aeronautique*, p. 255.

vised and consented to the ratification of the Declaration in its absolute and prohibitory form.[3]

With the introduction of aerial navigation, the world became confronted with a means of warfare that challenged the efficacy of international law in what had been hitherto regarded as one of its highest functions, *viz.*, that of restricting war to combatants. The difficulty of launching explosives from aircraft with any precision against legitimate objects of attack, especially when bombing by night, or at great altitudes in the day time, tends to render nugatory many of the most salutary provisions of international law applicable to war on land and on sea. This is true in respect of aviators acting in perfect good faith. It is, of course, much more emphatically true of aviators uncontrolled by the discipline of an armed force acting under some civilized manual of war. In other words, aerial warfare outside the military zone is morally destructive of an important part of the texture of international law. It practically nullifies the effect of rules protective of buildings dedicated to religion, or to charitable purposes, hospitals and places where the sick and wounded are collected;[4] and it ignores the distinction between combatants and non-combatants.

It was indeed alleged by the Allies that German aviators purposely operated by night in order not to be charged with knowledge of the places to which damage was done.[5] But the truth or falsity of this charge is immaterial for the purpose under discussion. If bombing be permitted, the protective rules become nugatory whether the aviator acts in good faith or not.

This leads us to consider other experiences of the war, still more significant. The wide navigating range of aircraft, developed in leaps and bounds both during and since the war, introduces a new and threatening danger to civilization. Aviators are now able to fly long distances and attack cities and villages far removed from the military zone. Many attacks of enemy aviators in France and England were upon towns undefended either by troops or fortifications and occupied solely by non-combatants. These acts were violations of international law both conventional and traditional, and do not require our attention at this time. We are considering acts of aviators in bombing cities admittedly occupied by troops, munitions of war, naval and military supplies and war factories. Under international law as we know it, such places are not immune from attack. To say that they are undefended against aerial attack is quite beside the question and not within the rule of customary law or the intent of Art. 25 of the Convention on Land Warfare or of Art. 1 of the Convention on Naval Warfare. To hold the contrary would, for example, permit a beaten and fleeing army to find a

[3] See Scott, The Hague Peace Conferences of 1899 and 1907, II, p. 527, n.
[4] Regulations respecting the Laws and Customs of War on Land, Art. 27.
[5] Garner, *op. cit.*, I, p. 501.

sanctuary in such a city, more secure than if it were to enter upon neutral territory.[6]

On the other hand, aircraft frequently function blindly as bombarding agents. It is the very nature of the instrument which makes it impossible to confine its use to legitimate purposes. We do not maintain that bombardment from the air is more cruel than other recognized methods of warfare, but we do maintain that it is now, and will become, increasingly more and more difficult to use aircraft at all for this purpose, without violating the rules protective of peaceful non-combatants. Furthermore, the bombardment of centers of population behind the lines has not justified itself as an element of direct military advantage. The language which the United States Government employed in the *Sussex* note to Germany on April 18, 1916, relative to submarine attacks upon vessels of commerce, which may be taken to have expressed one of the chief causes of American intervention, is applicable, almost without change, to aircraft as a means of bombardment: "The very character of the vessels employed and the very methods of attack which their employment of course involves, (is) utterly incompatible with the principles of humanity, the long-established and incontrovertible rights of neutrals, and the sacred immunities of non-combatants."[7]

Accordingly we propose that the dropping of bombs, explosives, and other destructive agents, from aircraft, be prohibited by a conventional rule of international law, except within the regular line of fire of military or naval forces of the belligerent to which the aircraft belongs. Such a rule would permit aircraft to operate for reconnaissance, communication and supplies. It would permit them to act in defense against other aircraft, but would prohibit their employment as bombarding agents except when directly auxilliary to land or naval operations and therefore subject to the same restraints.

It is of course assumed that prohibitions of certain new means of warfare, such as poison gas, liquid fire and noxious bacilli, will, if embodied in new conventional international law, be made to apply *a fortiori* to aircraft. Aerial navigation magnifies the destructiveness of these agents and emphasizes the fact that unless energetic international action be taken to limit the means of warfare, a relapse toward barbarism will threaten the very foundations of civilization.[8]

As aircraft operate in a medium and under conditions peculiar to themselves, it would seem advisable to embody the regulations by which they are

[6] Spaight, Aircraft in War, p. 16. See also British Manual of Land Warfare, sec. 119.

[7] *Am. Jour. Int. Law*, Supplement, X, p. 190.

[8] Westlake pointed out before 1914 that one of the chief principles to be observed in any improvement of the laws of war was "the extension of the list of absolute prohibitions so that methods of warfare which are still approved or faintly condemned may gradually be brought under a ban"; especially "when the suffering that must result is out of any reasonable proportion to the military advantage promised." Collected Papers, p. 281.

to be governed in time of war in a separate code, similar to those now controlling land and sea warfare respectively. Such regulations should provide that in the absence of specific provisions, the ordinary usages and conventions of war shall control.

In addition to the limited prohibition against bombardment already referred to, such a code should properly deal with the following subjects:

(a) Definition of the requirements in respect of aircraft and crew necessary to give them the rights and duties of belligerents in war. This would include the permanent marking of aircraft and the obligation on the part of aviator and crew to wear the uniform, or other distinguishing emblem, of the national forces.

(b) Definition of acts of hostility by private enemy aircraft and neutral aircraft, and the penalties to which they may be subjected.

(c) The rights and obligations of belligerents in respect of private enemy aircraft within the territory at the opening of hostilities.

(d) A prohibition against private enemy aircraft from navigating above the territory of the enemy state.

(e) The conditions under which a belligerent may prohibit the navigation by neutral aircraft above belligerent territory.

(f) The prohibition of belligerent aircraft from navigating over neutral territory, and the obligation of neutrals to observe due vigilance to prevent violations of neutrality and to intern all military aircraft and crews found on neutral territory. The export of aircraft as articles of commerce is not intended to come within the rule.

(g) For the purpose of protecting the right of battleships to enter neutral ports, aircraft assigned to a battleship will be deemed to form a part of the ship when in contact therewith.

(h) The definition of espionage in respect of aviators, with such modification of Art. 29 of the Hague Regulations of Land Warfare as will protect all belligerent aircraft, except when acting clandestinely, or under false pretenses.

2. IN TIME OF PEACE

To regulate international aerial navigation in time of peace in such manner as to promote a progressive international commerce, presupposes conventional agreement. It is due to the initiative of the French Government that the elaboration of a convention of this character was placed upon the agenda of the Peace Conference at Paris. The result of the labors of the commission to which this task was entrusted, is known as the Convention relating to International Air Navigation, and was signed on October 13, 1919, by all the Allied and Associated Powers excepting Japan and the United States. It is not within the limitations of the present paper to discuss in detail the provisions of the convention, further than to say that in its main features, it has been favorably received by persons technically

competent in the art of aerial navigation. Its detailed provisions have been analyzed in the publications of this Society and need not be repeated at this time.[9]

It should be noted that not only is the convention restricted to peace times, but also that it is divorced from any of the arrangements of the peace. The International Commission for Air Navigation is not entrusted with the execution of the air clauses of the peace treaties. It is true that this body is referred to in Article 35 "as part of the organization of the League of Nations," but the convention nowhere indicates the character of the relationship. On the contrary, adherence to the convention by states not members of the League is expressly contemplated by Article 44. Indeed the relationship seems to be that which the League was intended to maintain with all present and future international administrative unions, under Article XXIV of the Covenant. Accordingly, with the elimination of the words already referred to, there would not seem to be any serious difficulty in the way of adherence by nations not members of the League to a convention creative of this new international union.

The cardinal principle of air navigation, international as well as national, is uniformity. Air navigation cannot be conducted in pursuance of variant regulations, with safety either to the occupants of aircraft, or to persons and property located upon the earth's surface. A coordination is required between international and national legislation, similar to that which admiralty jurisdiction maintains in respect of maritime shipping. It may be found advisable to extend admiralty jurisdiction in the United States over all aerial navigation. Whether the admiralty clause of the Constitution (in Art. III, Sec. II, 1) inherently confers this power upon the Federal Government, is a domestic constitutional question with which we are not here concerned. The power to regulate commerce with foreign nations and among the several States is, however, expressly conceded. The railroad, as we now know it, could not have been visualized as an instrument of interstate and foreign commerce at the time of the adoption of the Constitution, any more than aircraft. But the Federal control of the railroad is now almost complete. The character of State legislation already existing, relating to aerial navigation, points to the necessity of Federal regulation at an early date; otherwise the United States will not be in a position to enter into reciprocal treaties without serious conflicts with State jurisdiction.

Furthermore, the whole art of aviation is still in a fluid stage and international regulation must be responsive to changes from time to time. The British Government, in its Air Navigation Act of 1919,[10] creates the office of Secretary of State for Air, with power to promulgate air-navigation regulations with the force of law. The regulations already promulgated follow

[9] "International Aerial Navigation and the Peace Conference," *Am. Jour. Int. Law*, July, 1920, p. 369.

[10] 9 George V, chap. 3.

closely the technical provisions of the International Convention. This practice might well be followed in this country, just as now the board of supervising inspectors of steam vessels exercises a similar power under our own present navigation laws.[11]

It is perhaps with these or similar powers in mind that the President, in his recent message to Congress (April 12, 1921), has recommended the establishment of a Bureau of Aeronautics in the Department of Commerce, "for the Federal regulation of air navigation." On April 19, 1921, the President transmitted to Congress, with his approval, a special report of the National Advisory Committee for Aeronautics, outlining a detailed national policy for the development and control of air navigation in the army, in the navy, in the mail service and for commercial purposes. The commercial development of air navigation is relied upon to build up a potential war service upon a tremendous scale. Other nations are following a similar policy. It is therefore of vital importance that the limitations affecting their use shall be agreed upon at an early date. Colonel de Watteville, formerly of the British General Staff, has stated that at the end of the recent war, the whole plan of campaign on both sides was nothing more nor less than an attack upon the morale of the civil population. At the same time, he pointed out the facility with which commercial aircraft may be converted to war uses.[12] Thus any plan of disarmament would be futile without taking into account some effective regulation of aircraft.

Let us conclude with a determination stronger than a pious wish that, so far as lies within the power of international law, aerial navigation may become a potent force for promoting friendly intercourse, but that it may be prevented, under effective sanctions, from becoming a means of uncontrolled and widespread disaster and destruction in time of war.

President Root. I am requested to announce that the Executive Council has appointed as members of the Committee on Nominations of officers of the Society, Messrs. Francis W. Aymar, Jesse S. Reeves, Arthur K. Kuhn, Charles Ray Dean, and Edward C. Eliot. They will be expected to report at the meeting of the Society on Saturday morning.

I am also requested to announce that Subcommittee No. 4 will meet in this room at 9:30 o'clock tomorrow morning.

I am asked also to request the members to obtain banquet tickets not later than tomorrow as the seating arrangements must be made Saturday morning, and if you do not obtain your banquet tickets tomorrow you will have to stay outside and gnash your teeth.

The Society will now adjourn until 10 o'clock tomorrow morning.

(Thereupon, at 10:00 o'clock p. m., an adjournment was had.)

[11] U. S. Revised Statutes 4405; ". . . . and such regulations, when approved by the Secretary of the Treasury, shall have the force of law."

[12] Report of the Portsmouth Conference of the International Law Association, 1920, pp. 424–425.

MEETING OF COMMITTEE FOR THE ADVANCEMENT OF INTERNATIONAL LAW

Friday, April 29, 1921, 10 o'clock, a. m.

The Committee met at 10:45 o'clock a. m., Professor GEORGE G. WILSON presiding.

Chairman WILSON. Mr. Root asked me to preside temporarily as he has another meeting at which he has to preside in the early part of the morning.

The subject for the morning meeting is stated in the program as "Meeting of Committee for the Advancement of International Law, to coordinate work of the subcommittees."

These subcommittees, as I understand, conferred yesterday and are ready this morning to make preliminary reports for discussion and coordination. These discussions, I presume, will be under the ordinary rules of the Society, namely, not longer than five minutes to each speaker, without the consent of the floor.

The reports of the subcommittees, then, will be in order, and if there is no objection we will proceed first by calling for the report of Subcommittee No. 1, whose subject is "To restate the established rules of international law, especially, and in the first instance, in the fields affected by the events of the recent war." Mr. Charles Noble Gregory is chairman of that subcommittee.

Mr. CHARLES NOBLE GREGORY. I beg to state, Mr. Chairman, that I think it would be impossible to make a statement within the limits as stated by the chair, if I understand five minutes as a limit applies to us.

Chairman WILSON. You misunderstood. I said the discussion of the report from the floor would be limited, under the ordinary rule, to five minutes. The chairmen of the subcommittees have the entire forenoon at their disposal. Mr. Gregory has the floor for five minutes and as much more as he sees fit to use.

Mr. GREGORY. Now, I do not know the extent to which I ought to go into the matter of our report at this time, but I think that probably the first thing to do is to explain to the general committee the scheme of our report and the reasons for its adoption. Dr. Scott, chairman of the program committee, said to me that he thought it would be desirable that Subcommittee No. 1 should take for its theme the violation of the laws and customs of war as reported by the Commission on Responsibilities of the

Conference of Paris of 1919. Acting upon the suggestion of Dr. Scott, the subcommittee has followed that course.

The commission whose report, therefore, became our guide, in the first place report the violation of neutral territory, and we therefore begin on the report by endeavoring to state the rules of international law as to the violation of neutral territory.

The commission proceeds further by citing 32 examples of offenses committed by the forces of the Central Empires and their allies against the laws and customs of war and of humanity. Your subcommittee took up those 32 points and prepared brief and tentative statements as to all except four. Three of those four points were confided to a member of the committee at a distance and he was expecting to prepare them and to present them here. I have received a telegram from him explaining that he is detained in a case and has not been able to prepare anything and has not been able to attend. They were points of special difficulty. The other one is a point regarding which we have made no suggestion. We find ourselves with nothing to act upon.

Now, Mr. Chairman, I should like to ask the pleasure of the committee as to how far further than this I shall make the report. The report is, according to the program, to be submitted tonight to the Society. Will we have time to take up the report and go through it? We submit it as a tentative and preliminary report and do not ask action upon it because it is too hasty. It may be the basis of final action, and we ask leave to file it as a report of progress. That suggestion again was made to me by Dr. Scott and I agree with him and the subcommittee agreed to it heartily.

We were appointed within a very short time of the meeting, and we were not able to meet until just before the conference and we therefore feel that the work should not be treated as final but submit it as a tentative and preliminary report.

If you please, I would like to ask the instruction of the Chair as to whether we shall read the report.

Mr. EDWARD C. ELIOT. Mr. Chairman, it seems from Mr. Gregory's statement that he has accomplished the purpose of the subcommittee so far as this committee is concerned, because he has stated definitely what the function of that subcommittee is admitted to be, and therefore it would be unnecessary to go into the detail of this report. It is clearly within the purview of the subject as he has outlined it, the general object of this meeting being to coordinate the work of the subcommittees. Therefore, if proper, I move that the report of Mr. Gregory be received and that he be relieved from a further statement of action taken.

Mr. FREDERIC R. COUDERT. I am not sure that I got the matter quite clearly in mind. Is the report of your subcommittee going as the report of this whole committee to the Society tonight and then to be definitely passed upon?

Mr. GREGORY. I do not so understand. The program, I think, states that the reports of the subcommittees are to be submitted tonight, but this is a meeting to coordinate them so far as possible. It seems to me it might be a very useful procedure for each chairman to state to the whole committee the scheme upon which his subcommittee has acted and then if any further consultation or correlation is possible, that might follow.

Chairman WILSON. The motion was not seconded, as I undertsand, and has not been put.

Mr. COUDERT. I second the motion.

Chairman WILSON. The motion is made and seconded that this report be received.

Mr. ELIOT. And that the suggestion of the chairman be accepted and that it be unnecessary to present the full report of that subcommittee to this meeting.

Professor EUGENE WAMBAUGH. Upon that latter point I must say that I would like to know about this matter of correlation. I would like to hear the subcommittee's report. If it would take half an hour I know we have not the time, but I suppose it would take only about ten minutes?

Mr. GREGORY. The report takes in about 25 pages.

Professor WAMBAUGH. This is really interesting information for me, and I think for all of us. I will know best what the scope of the committee work is when I know concretely what it has done.

A MEMBER. Would it not facilitate our consideration if Mr. Gregory gave us in summary fashion the points which he has brought out in his report.

Chairman WILSON. If you will pardon the chair, I scarcely see how we can go ahead with the work of coordinating the work of the subcommittees without knowing what they have done. We have a very brief sketch but I think it would hardly be possible from it to prevent overlapping in the work of the subcommittees. It is for the house to decide, but I think most of us would like to hear more from Mr. Gregory's report.

Mr. GREGORY. I think our different subcommittees have had entirely different conceptions of their duties. Their appointments call for entirely different conceptions. If I could hear from the other subcommittees and their chairmen concerning the general scope taken in hand, I think it would be a great help, and then, having heard from each chairman, the reports could be presented and possibly compared and dealt with as the committee saw fit.

Chairman WILSON. Any procedure that the house would like will be all right. If it would like simply a preliminary presentation by each subcommittee and then a further presentation later, then perhaps we would allow the motion to lie upon the table.

Mr. ELIOT. If that is the Chairman's view, I will withdraw the motion and have the program proceed in that way.

Chairman WILSON. It is suggested that brief reports be made by the subcommittees first, to give a survey, and then later that more detailed reports be made as may be needed. If there be no objection, we will proceed according to that fashion.

The second report is from Subcommittee No. 2, the subject being "To formulate and agree upon the amendments and additions, if any, to the rules of international law shown to be necessary or useful by the events of the war and the changes in the conditions of international life and intercourse which have followed the war." This report will be made by Dr. Judson.

Dr. HARRY PRATT JUDSON. This subcommittee understood its function was to suggest any new rules of law and amendments to existing rules of law.

We had a vast number of suggestions from members of the subcommittee and others. We have found it, in the first place, entirely impossible to go over a large field and formulate in a definite shape amendments to any great extent in the very short time at our disposal.

The subcommittee was appointed very recently and we met for the first time yesterday, and, therefore, we went over the suggestions and agreed to select a few of them for the consideration of the Society; a very small number, our idea being that that might make a start, at least. Others we did not pass upon at all for lack partly of any adequate time, and secondly, because many suggestions appeared to overlap the functions of other subcommittees with which we are not concerned.

Therefore, our report will be extremely brief and will embody the suggestion of some six points which we desire to have considered, especially as it was the understanding of our subcommittee that the Society will doubtless appoint a committee or committees to take into consideration anything which may be suggested at this meeting so as to give adequate study for another meeting of the Society.

That, in substance, is the report of Subcommittee No. 2.

We had in mind selecting some points for consideration, and we had in mind also that the reports of all these committees would doubtless have some bearing upon the Court of International Justice.

May I simply speak of the points?

(1) Responsibility for illegal acts of states.
(2) Transfer of territory.
(3) Free access to the sea.
(4) Protection of prisoners of war.
(5) Neutral prizes.
(6) The status of government vessels.

Those are the points which we discussed and selected out of more than a hundred which were submitted to us for consideration, and out of several

hundred more that might be considered if adequate study were given to the entire subject.

Mr. FREDERIC R. COUDERT. May I ask whether the committee came to any conclusion in regard to those points?

Dr. JUDSON. Yes sir; in some cases definitely, and in other cases it was decided to refer them for consideration, recommending that they be considered adequately within the coming year.

Mr. COUDERT. Possibly I misunderstood the function of our meeting, but I see some of my colleagues seem to be in the same situation and same state of misunderstanding, and therefore I make bold to state it. I assumed we were coming together to hear from each chairman the definite conclusions each subcommittee had reached, those definite conclusions to be submitted to this meeting, and if this meeting of the whole committee concurs in the conclusions reached by the several subcommittees, then those conclusions here reached would go finally tonight to the whole body. That was the understanding I had of it. I may be wrong, but I do not see that we could get anywhere unless we could know just what conclusions each subcommittee reached. Otherwise, there is nothing for this committee, as I see it, to pass upon. Am I right about that?

Chairman WILSON. As I understand, and I am open to correction, of course, our function this morning is, so far as possible, to delimit the fields of work of the different subcommittees because they may easily overlap. There is no reason why two committees should be doing exactly the same thing. I am taking it from the title as it reads here, "To coördinate the work of subcommittees," and in order to do that we must know roughly what the subcommittees have done.

Mr. COUDERT. Then, we need to know only the topics they treated and not the conclusions.

Chairman WILSON. I think we scarcely need the conclusions. I am entirely at the disposal of the house, but I understand that as our function.

Dr. JUDSON. Subcommittee No. 2, with the great number of cases before it, thought it impracticable to reach conclusions in definite form on short time. Of course, we had personal opinions. We met for two or three hours yesterday, but the field is so vast and the study required to form conclusions should be so extensive that it seemed to the committee impracticable to express conclusions on most of these subjects which would be worthy of the consideration of the Society, and therefore we recommended further consideration and study rather than definite conclusions at this time.

It would seem to the subcommittee that many of these things require long and careful study and that definite formulation as a result of that study could be presented later, but not on two weeks or one day's notice. That is the reason this subcommittee did not present more detailed recommendations.

That may or may not conform to the wishes of the general committee. If not, of course, the subcommittee will meet again this afternoon and follow such instructions as the general committee may give us.

Mr. WILLIAM C. DENNIS. I did not understand that this general committee is to make a report to the Society tonight, but that each separate subcommittee will report.

Chairman WILSON. That is as I understand it.

Mr. DENNIS. So that Subcommittee No. 1 does not have to agree with Subcommittee No. 4 at all. All we need to do is to separate the fields.

Chairman WILSON. That is as I understand it, so that there will be no duplication.

Professor MANLEY O. HUDSON. Will there be opportunity this evening for the discussion of the recommendations of the various subcommittees?

Chairman WILSON. I see no reason why there should not be. They make their reports, and I suppose any report made to the Society would be open to discussion by the Society.

Subcommittee No. 3 has as its function "To endeavor to reconcile divergent views and secure general agreement upon the rules which have been in dispute heretofore." Of this committee Governor Baldwin is chairman.

Hon. SIMEON E. BALDWIN. Subcommittee No. 3 has regarded this meeting tonight as one not for the discussion of points, not that we desire to have the opinion of the Society definitely on those points, but the subcommittee will present the points to be made the subject of discussion hereafter. We have come to the conclusion to note some half dozen different subjects which are worthy of particular consideration, and I will read them:

(1) The forms and requisites of declarations of war since 1914.

(2) The effect of war upon treaties, that is, opinions concerning the force of the treaty between the United States and Prussia of 1785 and 1828.

(3) The rules of land warfare, that is, the controversies concerning the application of Article 23 (h) of the Fourth Hague Convention of 1907.

(4) Problems of maritime warfare, that is, the abolition of the distinction between absolute and conditional contraband, and the extension of the doctrine of continuous voyage.

The following suggestions have been made:

(1) That outside of neutral jurisdiction, the ultimate destination of a neutral vessel or cargo determines the liability of either to condemnation.

(2) That there should be considered the abandonment of the doctrine of conditional contraband, specifically with reference to the treatment of foodstuffs.

(3) That there should be considered the feasibility of a general agreement concerning the operation and effect of neutral governmental certification of the non-hostile uses of neutral foodstuffs destined to hostile territory, as a safeguard against capture and condemnation.

We ask that the Society embrace these points under the subjects for future consideration.

Chairman WILSON. If there be no objection this report will be received. It will be observed that this report overlaps the report of the preceding subcommittee in several respects.

Subcommittee No. 4 has as its duty the consideration of subjects not now adequately regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted. Dr. Paul S. Reinsch is chairman of this subcommittee.

Dr. PAUL S. REINSCH. This Subcommittee No. 4 is apparently a residuary legatee and to it fall the things which the other committees do not consider to be within their province.

We have endeavored to define for our own information and guidance the functions of the subcommittee in this language:

"The committee deals essentially with matters entirely new or only partially settled by precedent, and will also deal with questions which the other committees have not considered sufficiently settled to make part of their work.

"More specifically, the function of the committee is to suggest topics on which there should be rules of international law or policy regarding matters which have heretofore been or which hereafter may become productive of war or of international friction."

Now, I may state that in the discussions of the subcommittee which have taken place yesterday and early this morning, a strong feeling was expressed that it would not be desirable for the emphasis of the action of the Society to be placed entirely or even primarily on the rules of war or laws of war; that unless the rules governing normal relationship among nations can be developed—in other words, unless the principle of common interest expressing itself in common action or joint action and joint interpretation, can be given development and thereby there can be created a strong feeling of solidarity among the different nations, the mere reaffirmation or strengthening of the rules of law will not be of very much advantage, because there would not be back of it that strong, social feeling throughout civilized humanity which will ensure the enforcement of such laws. That feeling must be generated in times of peace, and not only by way of making rules to be applied when war arises, but by creating normal relationships and protecting them by legal arrangements which will in themselves afford strength to that feeling of solidarity upon which the enforcement of any rules of whatever kind must depend.

Now, I might say that the subcommittee, having only just begun to act, agrees with the statement made by the other chairmen of committees that we can hardly be expected to do more, and are undoubtedly not expected to do more, than to indicate topics which should be studied in the immediate future with a view of presenting more complete and more definite conclu-

sions. Probably this subcommittee will present certain topics requiring immediate study and immediate formulation in order to be of assistance to the work of the court, and other topics not so directly connected with that great work which yet through their inherent importance require attention.

We have not formulated our report at all, because it was dependent upon the position the other subcommittees would take with regard to the matters that they desire to occupy. The fields have now been indicated by each chairman for his subcommittee, and it will be possible for this fourth subcommittee to be sure of its ground in making recommendations.

For your information I wish simply to read a list of topics which have been suggested by members of the subcommittee and which will be now considered by the subcommittee as a whole with a view of including them in the final report if deemed advisable:

The international regulation of monopolies and combinations in restraint of trade.

The doctrine of international public utilities.

The neutralization of mandatory territories.

The control of production and distribution of the chief raw materials.

The exploitation of undeveloped countries.

All those subjects which are included under the term of "the open door policy."

Rules of international law to cover the guilt of individuals who have brought about aggressive warfare.

A definition of acts which might be characterized as international crimes.

Espionage in time of peace.

The subject of intervention, the grounds upon which intervention is justified.

The applicability of the whole theory of state equality to modern political conditions, and in modern international organization. (That is a question of principle or policy and has particular reference to discriminatory legislation and preferential tariffs.)

Recognition of changes in government where it does not involve the substitution of an entirely new government.

The general conditions upon which new states should be admitted into the family of nations.

Recognition of new, *de facto* states.

Wider application of the principle of neutralization of states.

Uniform regulations with respect to conflicts of citizenship.

Uniform regulations with respect to the rights of resident aliens.

The common use of the high seas and territorial waters.

Definite rules concerning extradition.

The ethics of diplomacy, particularly with respect to secrecy.

The right of asylum.

The relations of international administrative unions and their activities.

The protection of domiciled aliens.

International debts and obligations (involving the consideration of so-called Drago doctrine).

Clear distinction between sovereign and semi-sovereign states.

States under wardship.

The jurisdiction of the air.

Rights and immunities of consuls (which rest at the present time entirely upon an indefinite series of precedents based on the good will of the state receiving the consul).

Specific definition of the rules relating to electrical communication.

The avoidance of double taxation and the adjustment of the claims of different sovereignties to taxable properties.

One member who is not present here suggested that the Society should devote attention to the codification of private international law and should favor the participation of the United States Government in the conferences on private international law, from which we have hitherto held aloof.

I must apologize for the unfinished character of this report. I have given this list merely in a tentative manner so as to give an idea as to what subjects are before the subcommittee. The subcommittee will select from these subjects those which appear to be most in need of early consideration.

Chairman WILSON. This report will be received unless there is objection.

What is the wish of the Society as to what to do now with these reports?

Professor WILLIAM I. HULL. I observe that there are some instances of overlapping in the reports, and I move that the chairmen of the subcommittees be requested to get together and decide among themselves as to which subcommittee each of these topics shall go, referring to those which have appeared in more than one report.

Mr. CHARLES HENRY BUTLER. Speaking to that motion, it is what necessarily will have to be done. I would suggest, however, that that committee should be a standing committee and should be known as the jurisdictional committee. It could determine not only now but from time to time to which committee a subject shall go.

The suggestion that the four chairmen get together and form a committee is a good one, but it seems to me that that commmittee on jurisdiction ought to consist of the chairman and secretary of the whole committee, the chairman of each subcommittee and say one from each subcommittee to be named as an alternate by the chairman. In that way the jurisdictional committee will be able to decide. It might not be able to reach a conclusion between the four chairmen, but in regard to such a matter I should think that the chairman and secretary of the whole committee ought certainly to participate, and that will give a finality to the decision of jurisdiction. Sub-

jects could then be referred specifically by that committee to the four different subcommittees and there would be no overlapping and no question of jurisdiction, which certainly must be delimited. Otherwise there would be considerable overlapping. In that way this committee, which has already been suggested and which I endorse, could be a standing committee and from time to time refer these subjects,—and it is going to be impossible to take all of them up at once,—to subcommittees Nos. 1, 2, 3, and 4, beginning with a certain number at its first meeting, so that each subcommittee could have a docket which it could take up and distribute between its own members. If you will accept the amendment that that committee on jurisdiction include not only the four chairmen but the officers of the general committee, I would make that suggestion.

Professor HULL. I will be very glad to accept that amendment. It seems to be a very useful procedure. May I inquire who the president and secretary are?

Chairman WILSON. Mr. Root and Mr. Scott.

Mr. BUTLER. I understand that the present meeting is a meeting of the general committee, and that the present chairman is presiding in the absence of the chairman of the committee.

Chairman WILSON. Yes.

Mr. BUTLER. So a motion would be in order that an additional committee be appointed consisting of the chairmen of the four subcommittees and one additional member of each subcommittee to act with the chairman and secretary of the whole committee as a jurisdictional committee.

Dr. JUDSON. The motion is admirable, I think, so far as procedure is concerned, but I understand these committees are committees for this meeting only. The Society may or may not appoint other committees to continue. I trust they will. They may or may not appoint them. I do not know what action they will take. Therefore the motion looks toward a standing organization of committees which I do not suppose has yet been constituted. Am I correct?

Chairman WILSON. I presume you are, because I know of no action of the Society constituting this committee permanently.

Dr. JUDSON. So that Subcommittee No. 2 is only for this meeting. It is a very admirable motion and I think it ought to be accomplished in some form.

Mr. BUTLER. This jurisdictional committee may necessarily function only so long as this whole committee is in existence, but we need it this afternoon so as to get this delimitation for our reports this evening, and then if the Society continues the organization of the committee, it may be done on motion that the organization of the committee, as made by itself, can continue.

Mr. ARTHUR K. KUHN. I very much agree with the suggestion, except that I would add that this new committee be not only a committee on juris-

diction, but also a committee on plan and scope. It seems to me it is equally as important that the general committee should be working toward some definite results and have a directive agency as to the subjects which they consider of most immediate and present importance.

From the reports that we have received from the four chairmen this morning, there is simply an overwhelming amount of material, and while the jurisdiction of that overwhelming material might be very well distributed and correctly distributed among the subcommittees, they might all have a right to deal with any one of these many questions, and the result would be that the general committee would not arrive at definite results upon immediate and pressing questions.

I think the committee on jurisdiction ought to have the power also of determining those questions which the various subcommittees shall deal with first in some adequate and complete manner, so I suggest that the committee be made one of jurisdiction, plan and scope.

Chairman WILSON. Would it meet Mr. Kuhn's idea if you simply called it a committee on the organization of the work?

Mr. KUHN. Certainly.

Chairman WILSON. I mean that would cover distribution, allocation, etc.

Mr. KUHN. If it were assured that that committee is to fix the work of the various subcommittees.

Mr. BUTLER. So as to include jurisdiction, plan and scope?

Chairman WILSON. Yes. The motion is made that a committee on organization of work, consisting of the chairman and secretary of the committee as a whole and the chairman and one additional member from each subcommittee,—

Mr. BUTLER. The question is whether that should be an alternate or a member. It might make the committee too large.

Chairman WILSON. That would be ten. That is a large committee. In the other case it would be six. I think six is large enough.

Mr. BUTLER. The chairman of each subcommittee, with power to appoint an alternate.

Chairman WILSON. Then, as I understand, the motion before the house is this:

That a committee on organization of work be appointed, consisting of the chairman and secretary of the committee for the advancement of international law, together with the chairmen of the respective subcommittees, who have power to appoint in each case an alternate.

Governor BALDWIN. Would that look to the continuance of this committee as a permanent one?

Chairman WILSON. I understand this is merely to function during the period of the life of this committee on the advancement of international law. Whether or not the Society will continue this committee or not is for the Society to determine at its regular meeting.

Mr. COUDERT. May I make an individual suggestion for what it is worth? I take it that certain sections of the human race have interested and perhaps amused themselves for a great many generations in proposing the ascertainment and codification of the law of nations. It may not have begun after the dissolution of the Roman Empire in the west, but it certainly did begin after the dissolution of the Roman Empire in the east and it probably will continue for some time to come. Evidently we are coming to that in our efforts of dealing with and crystallizing that century-old process, and the law of nations will be codified and reformed. I am rather a skeptic, and I am somewhat doubtful of that being done, but at the same time I think we should feel a certain modesty in regard to these matters, and under the circumstances I would suggest that this illustrious body of jurists here assembled, under all the circumstances, pass some sort of resolution to the effect that there are a great many problems here wide in scope and hoary with age and accentuated by present and past difficulties that cannot be readily solved this afternoon or even this evening, and that under those circumstances this general committee out of the abundance of its wisdom suggests to the Society this evening the value of making this kind of a committee, independent, of course, of the personnel, permanent; that we do not wish to perpetuate ourselves, but that a committee of this character be made a permanent committee or standing committee of the organization, to report again next year the result of its further researches, so that the law of nations may not be reformed, codified and crystallized more hastily than would seem wise and expedient.

I throw out that suggestion because I think it may be useful today.

Chairman WILSON. Are there any further remarks?

Dr. JUDSON. I would like to second the motion.

Chairman WILSON. There is a motion before the house for the appointment of the committee on organization of work. Are there any further remarks? If not, all in favor will signify by saying "aye"; contrary, "no."

The motion prevails.

Mr. COUDERT. Now, I renew my motion.

Chairman WILSON. I think it would be desirable if we could have that in a little more concrete form, Mr. Coudert.

Mr. COUDERT. I shall endeavor to concretize it: That it is the sentiment of this general committee that, owing to the wide scope, diversity and very great difficulty of the problems to be dealt with, the committee should continue; that this committee or a similar committee should continue its functions during the coming year and make a further report directly or through its subcommittees to the next meeting of the Society.

Mr. HYDE. I second that motion.

Dr. JUDSON. I want to second that motion. I confess that it is entirely impossible for us, meeting here in committees twenty-four hours or so before the meeting of the Society, to recommend any tangible or specific

things for the Society to act upon. In the second place I confess I feel not to be very much interested after all to amend the rules of international law. I am much more interested in finding out by whom rules of international law will be adopted and if they will be adopted by strong nations who will continue to violate them. Those are two things that appeal to me first of all of importance.

Chairman WILSON. Are there any further remarks? If not, all in favor of Mr. Coudert's motion, as stated, will please signify the same by saying "aye"; contrary, "no."

The motion prevails.

Now, is there any further discussion?

Mr. CHARLES G. FENWICK. Mr. Coudert has reminded us that we must not expect results too soon. I do not think we are in danger of doing so, and we are quite ready to agree to that point. I should like, however, to suggest that we should not limit ourselves to mere codification of international law. It seems to me quite clear that we shall not get very far toward meeting the problems of the world if we confine ourselves simply to codifying existing law or amending existing law. I feel it highly important that our committee should enter upon certain fields which have hitherto not come within the range of international law. I hope we shall not take so narrow a view of codification as to prevent us from essaying the task of formulating new rules for matters which have hitherto not been touched by international law.

Now, I confess to a great deal of disappointment which has already been expressed by others, that so many of our papers have dealt with the reform of the laws of war, and as Dr. Judson has just stated, feel it much more important that the Society reach out into new fields not hitherto touched upon.

We have not discussed at this meeting the question of international organization. I think we shall not get very far with any international court, unless we proceed to frame a tentative plan of international organization which shall make the law for that court. The process of extending international law by judicial decision is very slow. It will take many decades before much advance is made. Considering the fact that the court has limited its jurisdiction to such cases as may be brought before it, it will not hear cases which touch the real interests of the nations.

Therefore, I urge that the committee consider whether it is not within our jurisdiction to take up questions not hitherto considered as belonging to international law proper, and see if we cannot frame tentative rules to be offered, and make these rules the basis of an enlarged international law which will take into consideration the questions now regarded as matters of policy. Professor Reeves stressed that point yesterday, and I think it highly important to emphasize it again, that matters of policy shall be brought within the realm of law. They can be brought within the realm of

law and there is nothing inherent in them to prevent their being brought within the realm of law, and I say it is our task to try to bring them within the realm of law.

Mr. HYDE. May I add just a word to point out what seems to me to be the opportunity of this committee, if not at the present moment, certainly in the future. We know that in 1923 or in 1924 there will be a conference at the Hague for the advancement of international law; and we know that the United States will participate therein. It is a matter of vast importance that our Government be so fully prepared as to exercise its whole strength in favor of changes and modifications of the existing law which, in the light of the World War, the requirements of justice demand. Such an accomplishment calls for the most thorough preparation involving a close study of precise questions, and definite conclusions as to their solution. In this task of preparation doubtless various departments of the Government will lend valuable aid. But there is also room for the technical aid of a non-governmental and scientific body such as this Society. There is every reason to believe that the State Department will give earnest consideration to any suggestions or proposals which it may offer; and if, through this Committee on Organization, as outlined by Mr. Butler, and Mr. Kuhn, and Mr. Coudert, the Society can agree with substantial unanimity to a few concrete and definite constructive proposals, we may find the United States alert to advocate them. In view of that possibility, I think we ought to be stirred to bend every effort to agree a year hence to a few propositions which we can offer on points concerning which we have a conviction that the law ought to be changed.

Professor JESSE S. REEVES. May I say just one word? Of course, all conferences assume a certain air as to the finality of their deliberations, whether the conference be a federal constitutional convention or a mere subcommittee. It must appreciate its own activities to a certain extent by giving a note of finality to the result of its deliberations. Now, it seems to me that along that line considerable danger lies. There is a considerable assumption on the part of many, perhaps on behalf of most persons interested in international law, that international law should be codified, at least in so far as there may be said to be fairly settled principles. Indeed, if I remember correctly, this Society has had for a number of years a committee on codification of international law. I think this general committee, perhaps this committee which we have just created, might be in the way to invite opinion and perhaps express an opinion with reference to the matter of codification. I confess myself very agnostic with reference to that matter, but I rather fancy I am in the minority. I take it that the function of Subcommittee No. 1 was rather with the question of codification. Perhaps I am mistaken. But certainly the conclusions of this committee are still modestly tentative. Nevertheless, we must face the question as to codification.

It is interesting to note that at the meeting of the Assembly of the League of Nations one of the questions that came up was interpreted by Lord Robert Cecil as squinting toward codification, and, therefore, he opposed it and said it was the least opportune time in the history of international law to undertake codification. I simply throw out that as a suggestion, because I do think it is a very important function of this committee to make some inquiries as to codification at this time.

Now these suggestions come to us in the form, as I understand it, in which they were put out by the committee which drafted the plan for the Permanent Court at the Hague, and we have taken them just as we have gotten them. I must confess that I do not think that layout gives us an actual list of exclusive topics. Nevertheless, in so far as it appears to be exclusive, the first subject does look toward the question of codification, and, therefore, perhaps it might not be presuming that that subcommittee, of which I am not a member, would have something to say pro or con on the general question of codification.

Dr. REINSCH. I confess that I am somewhat surprised that several members of the committee seem to have had fears that there were among us those who consider our functions that of a world legislature. From the discussions it was quite apparent that the value which we see in the work of this committee lies in the material that would be covered, in the opinion which would be focused, in the way in which this Society could cooperate in the formulation of an American policy of international law, but not with the presumption of being able to furnish anything definitive and final.

With respect to the remarks of Mr. Fenwick, I do not believe it is necessary to pass a motion on that subject, because in case it is the desire of the governing board of the Society that those subjects should be considered, then new suggestions should be made as to the gathering of information on what may be feasible in the future. That is where I would lay the emphasis, and I hope my presentation of the committee's intentions and aims did not give a false impression, because it is by no means our desire to go further than to make a report on data, and that function of the committee necessitates, in fact, the organization which has now been provided for under the motion of Mr. Butler. But I have no fear that we shall go too far in the way of trying to lay down hard and fast rules.

Mr. BUTLER. I just want to say one word, and that is with reference to the Committee on Codification. There was to have been a motion presented yesterday that that committee be discharged and that the subjects entrusted to its consideration be transferred to this committee; so that there will be no embarrassment on the question of having a different committee of the Society which might in any way interfere with any one of the subcommittees.

Now, might I make the suggestion that this program calls for meetings of all the subcommittees at 2:30 o'clock. It seems to me, now that the

Committee on Organization has been appointed and that it will be necessary for that committee to have its meeting and delimit these matters so that the subcommittees will have that in their hands before their meetings, that it would be well if that meeting for 2:30 o'clock were postponed to a later hour. At that meeting, as I understand it, the different subcommittees will have to prepare their reports to be presented tonight. There will not be time between now and 2:30 o'clock for the Committee on Organization to get together and make that distribution, so might I suggest that the meeting of the subcommittees be changed from 2:30 to 4:00 o'clock, or even 4:30 p. m. Might it not be well to have it understood when we meet here to go to the White House that the hour of the subcommittee meetings will be announced?

Dr. JUDSON. May I say something in this connection? We have an appointment at the White House at 2:30 p. m., and I think the committee and the chairmen could meet after our adjournment here and then might call the subcommittees at such time as the respective chairmen suggest.

Mr. BUTLER. And let us know that when we come here to go to the White House.

Dr. JUDSON. Yes.

Professor AMOS S. HERSHEY. I have in mind merely one suggestion. I am in thorough sympathy and agreement with the point of view expressed here, more particularly by Dr. Reinsch, that the greatest problems confronting us are those dealing with international organization and international cooperation. I believe those are far and away the most important questions calling for our study and attention. And yet, on the other hand, I do not believe, or at least I fear that we have not as yet reached the stage when we can afford altogether to overlook or neglect the problems connected with the revision of the laws of war. Now, it seems to me that we have no place for that, apparently, in our scheme. The first subcommittee is exclusively occupied or interested in restating the rules of international law as they existed in 1914, and I take it that none of the other committees have had any revision of the laws of war, more particularly of land warfare, within their jurisdiction or province.

Dr. REINSCH. How about the second committee, Mr. Chairman, which has to do with amendments to existing laws?

Professor HERSHEY. Were there any questions of that kind included in the report?

Dr. JUDSON. It was undoubtedly within our scope, but we had no time, although it was within the scope of that committee.

Professor HERSHEY. I would like to make the further suggestion that in the revision of laws of warfare more attention be paid than has hitherto been the case to the actual conditions of warfare and to the opinions of leading military and naval authorities.

Mr. JACKSON H. RALSTON. I am interested, of course, very much in

this discussion, and I count it a piece of good fortune to be a member of the Subcommittee No. 4. The other subcommittees, to a very large degree, discuss the laws of war, or at least that seems to be the thing that is uppermost in the minds of many. I have never been able myself to know what the laws of war are. I have never been able to find that they had any sanction; that they are anything more than the customs which were generally adopted by people who had placed themselves in an abnormal relation to some other people. They are not enforced by any court. They are not laid down by any superior that I know of. Their observance is not obligatory in any way. They are not founded on any reason—absolutely no reason. By way of illustration, if the desire of one nation is to cripple another in warfare and submit it to its wishes, there is no earthly reason why prisoners should not be killed without mercy, provided it tends to carry out the wishes of the party doing the killing. That is the only test that we need of the propriety of the action; but I may be entirely wrong about it. It may be that there is some real philosophical justification for the rules of war which, I confess, has up to the present time entirely eluded me.

Now, I may be wrong again, and probably am, but it seems to me that we may at least hope for that Utopian time to come when the generations that come after us will look back with vague curiosity to what takes place relative to war. Just as we look back with an equally vague curiosity to the ancient specimens of armor, they will wonder why people chose those particular ways of killing each other. We look back to the ways which were adopted or which were formerly adopted in the treatment of slaves. We did away with slaves and we did away with all the regulations concerning slavery; and, taking this probably absolutely unorthodox view of the matter, I do not consider we are getting very far in discussing the laws of war which, after all, may be summed up in a very few words, and that is, the only real practical law of war which nations have recognized is to kill and destroy your enemy just as quickly and effectually as you can; and after all the writings and books we have on the subject, we reduce ourselves right down to that primitive notion when we come to put the so-called rules into effect. If we do not under given circumstances kill our enemies without question it is because we fear that under like circumstances our enemies will kill us without question. So, it is just merely a matter of ultimate convenience whether a given thing is a so-called law or rule or not.

Now, the fourth subcommittee deals with a matter of more importance from my point of view. The existence of armed conflict between nations presupposes a violation of rights; that some nation has done wrong. What does that wrong consist of? We have not yet commenced anything like a scientific examination of that subject. That is assuming the hypothesis I indicated; that is, that the foundation of war is an existing state of wrong in modern society.

I think if we test out this recent great World War we have gone

through, we will come to the conclusion that there was a wrong somewhere; that it was an industrial or economic wrong of some kind which sought redress finally through war, and perhaps as a result of long wrongs by one side or the other; and we will call to mind incidentally the Morocco question, the condition of affairs in Mesopotamia, and in Central Africa where, without any particular rule of law that has been laid down, the nations of the world quarreled about their respective spheres of influence or control.

Now, there was a violation of some law or laws, as I say, in connection with the recent great war, and I think we ought to know what those laws are which were violated. We ought to be prepared to formulate such demands, if you please, against wrong-doing as will bring about better results in the future.

Admiral CHARLES H. STOCKTON. Mr. Chairman, in response to the gentleman who has brought forward the subject of the laws of war, I would say that the laws of war are of no less importance than the laws or rules appertaining to peace time alone. They are an integral part of international law and are the part which represents to the "man in the street" the international law of the period, which law should be followed by the belligerents engaged in war. There is of course at the same time the law of neutrality which is also a war time law.

There is probably no subject germane to international law which has caused so many international conferences as the codes and laws of war. These conferences, sometimes of maritime nations alone, at other times of maritime and land Powers, have defined in various manners, and codified the laws of sea and land warfare to an extent not equalled in codification by the rules of international law applying to peace time alone. The laws of war, and the law of war or military occupation, cover and treat of matters of reality and of conditions existing or likely to exist in war time. It can be truly said that almost, if not all, of the authoritative codifications of international law, are those pertaining to warfare, which includes of course the laws of neutrality and the laws for the mitigation of the severity of war as found in the two Geneva Conventions.

The international conferences of prominence of this nature are those of St. Petersburg and Brussels, the two conferences of Geneva above referred to, the conference after the Crimean War which created the Declaration of Paris, and the two conferences held at The Hague. Not only at these conferences was an agreement arrived at, but conventions or treaties resulted therefrom, duly signed and ratified, which were or should have been of a permanent nature. They have not been disclaimed even in recent wars, even if in some cases they were not followed to a full extent by a delinquent belligerent. The existence of vice does not nullify virtue.

In addition to these codes of war, there have been a general establishment of rules of war, based upon the decisions of learned peoples, generally on matters of naval warfare, which have not been acted upon by conferences

but are generally accepted. In addition there are usages and customs that have grown up, in some cases dating back to the sea codes of the Mediterranean and the Northern seas. There are rules of land warfare derived from the ancients also.

There are no rules of international law, the violation of which cause a more ready and severe punishment than those of the law of war as applied in cases of military occupation. The invader has the inhabitants of an invaded country at his mercy, though his rule is subject to the laws of humanity and affected by the opinion of civilized states. The invasion and occupation of Belgium and northern France is too recent to make that an element of dispute.

When the situation is between belligerents in arms, punishment comes under the law of reprisals on the part of one belligerent against another. It may vary from the deprivation of letters to a prison camp to an execution of prisoners or captive hostages. It is almost as to rules and scope as extensive as the common law or the *lex non scripta* of a nation.

When the outbreak of war changes or creates new conditions, automatically, of all countries of the world into either neutral or belligerent, we cannot evade the laws of war and neutrality, whether we wish to or not. In fact, we cannot wash our hands of these laws unless we abolish war itself.

Even the treaty of peace of Versailles brings to those who have signed and ratified it, an aftermath of war conditions, in times of legal peace.

Chairman WILSON. If there is no other business to come before the meeting, we will adjourn.

(Thereupon, at 12 o'clock noon, the meeting adjourned.)

Reception by the President of the United States

At 2:30 o'clock on the afternoon of Friday, April 29, 1921, the members of the Society in attendance upon the Annual Meeting were received at the White House by the Honorable Warren G. Harding, President of the United States. About 250 members were present at the reception, headed by the Honorable Elihu Root, President of the Society.

FOURTH SESSION

Friday, April 29, 1921, 8:30 o'clock, p. m.

The Society met at 8:30 o'clock p. m., Hon. ROBERT LANSING, presiding.

Chairman LANSING. The program of the evening covers the reports of the Subcommittees of the Committee for the Advancement of International Law, and I will ask Mr. Charles Noble Gregory to make the report for Subcommittee No. 1.

Mr. GREGORY read the following report:

REPORT OF SUBCOMMITTEE NO. 1

To restate the established rules of international law, especially, and in the first instance, in the fields affected by the events of the recent war.

To the American Society of International Law:

Your committee, to which this work was assigned about a month prior to the meeting of the Society, at which its report was due, fully realizes that the preparation of a complete report would involve the arduous labor of a force of competent scholars and secretaries for a period of years. They have attempted no such impossible achievement. At the wise suggestion of Dr. James Brown Scott, Secretary of the Society and Chairman of the Program Committee, they took for present consideration as most plainly within the purview of their assignment, the rules of International Law most directly involved in the Report of the Commission of Responsibilities of the Conference of Paris of 1919 as to "The violation of the Laws and Customs of War." This report deals with the violation of neutral territory, and cites summary examples of offense by the Central Powers against the law of war under thirty-two heads.

Taking the above topics and regarding them as a mere beginning of a long labor, there is submitted a brief and tentative statement of the rules of International Law whose breach was so found and reported. The provisions which rest upon the sole authority of the Hague Conventions are by the terms of those conventions (the regulations as to Laws and Customs of War on Land), not to apply except between contracting Powers and then only if all the belligerents are parties to the convention (Article 20). As to Naval Regulations (in Scott's texts) there is a like provision (Article 18). In the main, however, these regulations merely codified and restated rules already widely received and, among more enlightened peoples, generally recognized as existing and obligatory. Regulations for the government of armies in the field issued by various governments were in the main in accord with them, and your committee is unable to consider the enlightened progress of international law, a great department of unwritten law, as abolished and

wholly replaced by the provisions of the Hague Convention with the serious limitation above indicated. They regard these conventions, except as to minor and specific rules, as merely declaratory of the best and most widely accepted views of the world upon these subjects in 1899 and 1907 from which there had been no departure on August 1, 1914.

With this preamble, they respectfully submit statements of the rules of international law upon the topics above as they conceive them to have existed at the date last mentioned.

Violation of Neutral Territory

The right of a sovereign state to remain neutral in case of war is incontestable. The territory of a state which remains neutral in time of war is inviolable by any belligerent. No act of hostility is to be committed therein, nor can the same be used as a base for hostile operations. Belligerents must respect the above rights.

A neutral country may repel by necessary force any attempted violation of its neutrality, and the use of such force is not a hostile act.

A neutral nation is bound to use all its available force to prevent a violation of its neutrality. If a neutral country consents to the violation of its territory by one belligerent, or fails to prevent the same in so far as it is able, it is a grave offence against the opposing belligerent and may expose the neutral nation to treatment by such other belligerent as one having forfeited its neutrality and become itself a belligerent. It may also be the basis for the recovery of damages.

The nationals of a neutral may furnish merchandise, including munitions of war, to a belligerent without violating the laws of neutrality.

The neutral nation, however, violates its neutrality if its government furnishes or sells to a belligerent munitions of war or in any way aids it against the other belligerent, or if it permits the enlistment of men or augmentation of equipment of vessels of war within its territory.

Partiality in thought and feeling alone is no breach of neutrality. Mere acts of humanity and charity, though extended only to one belligerent, are not a breach of neutrality.

Neutrality involves no cessation of intercourse with belligerents.

The stay of belligerent warships in neutral waters and aid or assistance to them by repairs, coaling, supplying, etc., is limited as to parties to such covenants by the Conventions of the Hague Conference of 1907.

A neutral Power must not allow belligerents to move troops or convoys of either munitions of war or supplies across its territory.

Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.

They are likewise forbidden (a) to erect in the territory of a neutral Power a wireless telegraphy station or other apparatus for the purposes of communicating with belligerent forces on land or sea; (b) to use any installation of the kind established by them before the war on the territory of a neutral Power for purely military purposes and which has not been opened for the service of public messages.

Corps of combatants can not be formed nor recruiting agencies opened in the territory of a neutral Power to assist the belligerents.

A neutral Power is not called upon to punish acts in violation of its neutrality unless the said acts have been committed in its own territory.

The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.

Contracts for the sale or furnishing of articles contraband of war made in neutral territory to a belligerent are lawful and will be enforced by courts of justice.

A neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless apparatus belonging to it or to companies or private individuals.

Every measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Articles VII and VIII of the Hague Convention of 1907 must be impartially applied to both belligerents.

A neutral Power must see to the same obligation being observed by companies or private individuals owning telegraph or telephone cables or wireless telegraphy apparatus.

A neutral state which has not broken faith may demand the same respect as in time of peace. It is presumed that it will observe a strict neutrality and will make no declarations and do no acts contrary to such obligation of impartiality. This rule is important as to passes, commissions and credentials issued by such neutral state. It is a presumption in favor of innocent and lawful conduct to which a neutral state is entitled.

Murders and Massacres, Systematic Terrorism

"A non-combatant is a resident of a belligerent state who takes no part in the war. He is not subject to the laws of war, and is protected by them, in his person and property, so long as he refrains from participation in military operations" (Geo. B. Davis, Elements of International Law (1908), p. 312).

"Family honor and rihgts, the lives of individuals and their private property, as well as their religious convictions and the right of the public are to be respected. Private property is not to be confiscated."

It is forbidden to kill or injure enemies except in the exercise of acts of war or as a punishment for crime. Murders, treacherous killings, massacres and terrorism are not allowed by the laws of war.

"Unnecessary or revengeful destruction of life is not lawful."

"Assassination and the killing and wounding by treachery of individuals belonging to the hostile nation or army, are not lawful acts of war (citing Hague Rules 23 (b)) and the perpetrator of such acts has no claim to be treated as a combatant, but should be put on his trial as a war criminal."

"As a consequence of the prohibition of assassination, the proscription or outlawing of any enemy or the putting of a price on an enemy's head or any offer for an enemy 'dead or alive' is not permitted."

Non-combatants "so long as they refrain from all hostilities, pay the military contribution which may be imposed on them and quietly submit to the authority of the belligerent who may happen to be in the military possession of their country . . . are allowed to continue in the enjoyment of their property and in the pursuit of their ordinary avocations."

"But this exemption of the enemy's persons from the extreme rights of war is strictly confined to non-combatants or such as refrain from all acts of hostility."

Non-combatants who take up arms or incite others to do so within occupied territory are exposed to the full rigor of the law of war.

If a commander of belligerent forces has good reason to mistrust the inhabitants of any place, he may disarm them and require security for good conduct.

"He may lawfully retain them as prisoners either with a view to prevent them from taking up arms, or for the purpose of weakening the enemy. Even women and children may be held in confinement if circumstances render such a measure necessary in order to secure the just objects of the war."

In the absence of just cause such restraints may be censured.

"Murder by treachery of individuals belonging to the hostile nation or army" is forbidden. (Brussels Declaration, 1874, Art. 12, 2 Halleck, p. 21, note.)

"Private citizens are no longer murdered, enslaved or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war."

"Those who lay aside their peaceful avocations and engage either directly or indirectly in hostile acts towards the enemy, whether by the orders of their government, or their own free will, are liable to the consequences which lawfully result from such acts, but to none other."

It is prohibited "to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion." (Art. 23, Regs. Hague Conv. IV (1907).)

Putting Hostages to Death

Hostages must be treated as prisoners of war, and for whatever purpose seized or accepted may not be put to death, and any such act is wholly unlawful however the giver of the hostage may fail in fulfilling his pledge. Hostages may not be placed in places of danger as a shield or a protection from acts of war against a belligerent.

"Any proceeding of rigor against a hostage, even if he be forcibly seized in time of war, beyond what may be necessary for the security of his person, is illegal and a violation of the laws of war."

As a prisoner of war, a hostage is to be treated according to rank and condition as circumstances admit. He is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering or disgrace by cruel imprisonment, by want of food, by mutilation, death or any other barbarity."

Deliberate Starvation of Civilians

"The lives of individuals are to be respected" (Hague Convention of 1907, Ch. IV, Sec. III, Art. XLVI).

But "War is not carried on by armies alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy" (7, Moore's Digest, 179).

The deprivation of belligerents or civilians of food as a result of a siege or a blockade or the lawful destruction of ships or means of transport, even to the point of starvation, is lawful, provided it is incident to an operation of war to subdue or reduce military resistance.

Torture of Civilians

"The lives of individuals are to be respected" (Hague Convention of 1907, Ch. IV, Sec. III, Art. XLVI).

Non-combatants in territory occupied by a belligerent are protected by the laws of war both in their person and property, except that they are subject to restraint and regulations required by the safety of the belligerent and that their property is subject to reasonable requisitions and contribution. So long as they conduct themselves peaceably and lawfully, they are not subject to further penalty or to torture or cruel treatment. Torture or cruelty to non-combatants who have conducted themselves peaceably or to prisoners of war conducting themselves lawfully are contrary to the laws of war and are forbidden.

Rape

Family honor and rights, the lives of individuals . . . are to be respected. (Hague Convention of 1907, Ch. IV, Sec. III, Art. XLVI.)

Grotius declares of rape "that the act has no tendency either to security or to punishment, and therefore ought to be no more unpunished in peace than in war. This latter rule is the law of nations, and the rule not of all but of the best." (Grotius, *De Jure Belli ac Pacis*, Vol. III, Ch. IV, Sec. XIX, p. 94.) And further, "And it is fit that this rule should be observed by Christians, not only as a part of military virtue, but as a part of the law of nations, that is, that he who violates a woman, even in war, shall be everywhere liable to punishment."

The violation or attempted violation of women in time of war is forbidden by the law of nations, and should be punished as a capital breach of the law of war when committed under such circumstances that the law of war is applicable. In territories governed by municipal law only the punishment is left to that branch of law.

All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking the place by main force, all rape, wounding, maiming or killing of such inhabitants are prohibited under the penalty of death or such other severe punishment as may seem adequate for the gravity of the offence.

A soldier, officer or private in the act of committing such violence and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior. All war crimes are liable to be punished by death, but more lenient penalty may be pronounced. Corporal punishment is excluded and cruelty in any form must be avoided. (Sub. 450, p. 97, Edmunds and Oppenheim, Land Warfare.)

Abduction of Girls and Women for Purposes of Enforced Prostitution

Family honor and rights, the lives of individuals . . . are to be respected. (Hague Convention of 1907, Ch. IV, Sec. III, Art. XLVI.)

The persons of non-combatants are protected, and any injury to them, except as an incident to operations of war otherwise lawful or as a punishment for crime or war treason, is unlawful and an offence against the law of war.

The abduction of women and girls by the military force or authority for the purpose of prostitution violates the above provisions and is an offence against the law of war and, like such crimes in general, may be punished by death.

Deportation of Civilians

International conventions as well as authorities on international law are wholly silent on the question as to the right of an invader, a military occupant, or a conqueror to deport the civilian population of invaded, occupied, or conquered territory.

But the Hague Convention on the Laws and Customs of War on Land (see Arts. 43 and 46), expressly recognizes an obligation on the part of the belligerent to "respect family honor and rights," as also to "respect, unless absolutely prevented, the laws in force in the country." It likewise declares that "neither requisitions nor services can be demanded from communes or inhabitants except for the needs of the army of occupation (Art. 52).

The only possible justification for any policy of deportation of any part of the civilian population of an occupied territory would seem to be a great and pressing danger necessitating on the part of the occupying belligerent, the "taking all steps in his power to re-establish and insure, as far as possible, public order and safety" (Art. 43 of the Hague Rules of Land Warfare). But these dangers requiring such extreme measures must needs be real and imminent, not imaginary or remote.

Internment of Civilians Under Inhuman Conditions

Westlake (Int. Law, Part II, p. 42) thus states the customary rule as it existed prior to the outbreak of the World War: "Modern international law forbids making prisoners of the persons, or confiscating the property of enemy subjects in the territory at the outbreak of war, or, saving the right of expulsion in case of apprehended danger to the state, refusing them the right of continued residence during good behavior." The discussions at the Second Hague Conference disclose the fact that it was then considered inadmissible to imprison enemy subjects at the outbreak of war.

"Owing, however, to the recent introduction of universal military service on the continent of Europe, there has been a growing disposition to recognize the right of belligerents to detain males liable to such service, in order to prevent them from returning home and enlisting in the enemy's army." (Garner, Int. Law and the World War, I, pp. 58–59.)

While there seems to be no precedent for such wholesale measures or policies of general internment of civilians as were adopted by European governments during the World War, there had been a growing tendency to justify the practise of internment of non-combatants when military commanders might deem such measures necessary or advisable. Thus, Benton (Int. Law and Diplomacy of the Spanish American War, pp. 27–31) justifies General Weyler's reconcentration policy in

principal, though he condemns it from the standpoint of method and expediency. He says (p. 28): "It was a military measure perfectly lawful in itself, provided the Spanish authorities could fulfill the corresponding obligation to protect the persons forced from their homes and could supply them with food."

Lord Kitchener was severally criticized for the establishment of concentration camps during the Boer War in South Africa in 1901. "Yet," says Spaight, "despite faults of management and administration, the concentration camps were a notable effort to deal humanely with a civil population who were the victims of a necessary military policy of devastation." (War Rights on Land, p. 310.)

According to the same publicist (*ibid.*, p. 307), concentration camps are defined as

> internment camps for non-combatants. They have been violently attacked on the ground that the laws of war do not permit of the inoffensive inhabitants of a hostile country, old men, women, and children, being made prisoners. Generally speaking, the objection taken to such camps is sound in principle. Article 46 of the *Reglement* inculcates respect for "family honors and rights, the lives of individuals and private property," and it is an interference with this war right of non-combatants to remove them from the home and intern them in military camps. Such an extreme measure is only to be justified by very extreme circumstances; in fact, by such circumstances as make concentration not only imperatively necessary for the success of the responsible belligerents' operations, but also the less of two evils for the inhabitants themselves.

The establishment of concentration camps for the internment of non-combatants or civilians is a subject upon which leading authorities seem to differ but they certainly can not be justified under inhuman conditions.

Pillage

The pillage of a town or place, even when taken by assault, is prohibited. (See Russian Instructions, Art. LL, 1904, German War Book, p. 107; Edwards and Oppenheim, Art. 138; Lieber's Inst. U. S., Art. 44; Austro-Hungarian Manual, 1913. All collected in Laws of Land Warfare, p. 217, supporting and in accord above.)

The pillage of a town or place captured or occupied by a belligerent, even when taken by assault, is prohibited. Such pillage is a breach of the law of war and may be punished by death or other penalty. Officers in command of troops are bound to use their authority and to take all precautions to prevent the same and on failure to do so may be held liable therefor. A superior officer observing any soldiers under his command committing an act of pillage must order them to desist, and if they disobey, he may lawfully kill them on the spot.

The prohibition of pillage does not extend to booty or spoils of war, which latter include arms, equipment, uniforms, horses, army stores and supplies and public money. Pillage is a term applied to the taking by force, and not by way of contribution or requisition, of private property in war.

Confiscation of Property

It is forbidden "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war" (Art. 23, Regs. Hague Conv. IV, 1907).

Movable property of individuals is inviolable on land, except in case of military necessity and except that the same is subject to requisitions and contributions, but with the exception stated below herein.

The taking or the carrying away of the same, subject to the exception above, by members of a hostile force is regarded as criminal robbery and subject to be punished accordingly. By the law of war private property must be respected unless it falls within the exception herein stated.

"An army of occupation can only take possession of cash, funds and realizable securities which are strictly the property of the state, depots of arms, means of transport, stores and supplies, and generally all movable property belonging to the state, which may be used for military operations."

All appliances, whether on land or at sea or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms and generally all kinds of munitions of war, may be seized even if they belong to private individuals, but must be restored and compensation fixed when peace is made." (Art. 53, Regs. Hague Conv. IV, 1907.)

The restrictions of the above articles do not apply to movable property found on the battle-field which may be appropriated.

Exaction of Illegitimate or Exhorbitant Contributions and Requisitions

Contributions and requisitions are permitted by the law of war to a belligerent occupying the country of an enemy, over and above taxes for the expenses and administration of the occupied territory. If the occupant levies other money contributions in the occupied territory, this shall only be for the needs of the army or of the administration of the territory in question.

Such contributions are limited exclusively to the needs of the army or of local administration, and all extortion or levy or collection for other purposes is forbidden.

All levies and executions must be reasonable and proportioned to the resources of the district or persons assessed.

The collection of fines by a belligerent is, in addition to the above contributions and requisitions, also allowed. Fines, in the law of war, are particular forms of extraordinary contribution consisting of collections of sums of money by the occupant for the purpose of checking acts of hostility. Such fines can only be levied in consequence of reprehensible or hostile acts committed by the community as a whole or at least permitted by it to be committed. Acts strictly of individuals can not give rise to collective punishment or penalty as to a community. The occupant may not levy contributions for the purpose of enriching himself or his government or for the general support of his government. Contributions can only be collected on the responsibility of a commander-in-chief and under a written order. (See Art. 51, Hague Conv. IV, 1907.)

The collection of contributions shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force. For every contribution a receipt shall be given to the contributor. Receipts are given to afford means of proof of payments

in order that other commanders may not make fresh impositions not knowing the levies already made. Also to facilitate recourse by the persons making payments to their own government if, on making peace, it determines to spread the loss suffered over the nation at large. They imply no promise to pay on the part of the occupant.

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country. Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied. Contributions in kind shall, as far as possible, be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible. (Article 52, Regs. Hague Conv. IV, 1907.)

"The occupying state shall be regarded only as administrator and usufructuary of public buildings, real estate, forests and agricultural estates belonging to the hostile state, and situated in the occupied country. It must safeguard the capital of these properties and administer them in accordance with the rules of usufruct" (Art. 55, Regs. Hague Conv. IV, 1907).

"The property of municipalities, that of institutions dedicated to religion, charity, and education, the arts and sciences, even when state property, shall be treated as private property." All seizure of, or destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings." (Art. 53, Regs. Hague Conv. IV, 1907.)

The protection above given to private property and to municipal property and to that devoted to religion, charity, education and the arts and sciences, applies only during military occupation. If the same is injured incidentally owing to operations of war in themselves lawful, this is no breach of the laws of war and imposes no liability. Such exemptions as apply to property dedicated to religion, charity, education and the arts and sciences, apply also to the right of capture at sea.

Collective Penalties

"No collective penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals, for which it can not be regarded as collectively responsible." (Art. 50, Annex to Hague Conv., 1907.)

Deliberate Bombardment of Undefended Towns

"The attack or bombardment by whatever means, of towns, villages, dwellings or buildings, which are undefended, is prohibited." (Art. 25, Hague Conv. IV, 1907.) The rules as to naval bombardment are believed to be in substantial agreement with the above.

Destruction of Merchant Ships without Warning

The destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew, is

forbidden, except when such ships either resist or attempt to escape capture. In such cases, during such resistance or attempt any force necessary to subdue and capture the vessel may be used against her without reference to the safety of those on board. Such right ceases when any vessel abandons the attempt to resist or to escape and submits peaceably to capture. The above rules apply to both neutral and belligerent merchant and passenger ships. They are not altered by the fact that such ships are transporting in the way of commerce, munitions of war. Nor are they altered by the fact that such ships are armed solely for purposes of defense.

In that connection, the subcommittee has attached as an exhibit the carefully prepared rules for the government of our naval forces in war, issued by the Navy Department of the United States in 1917.[1]

Coast Fishing Vessels

"Vessels used exclusively for fishing along the coast, or small boats employed in local trade, are exempt from capture, as well as their appliances, rigging, tackle and cargo. . . . They cease to be exempt as soon as they take any part whatever in hostilities. . . . The contracting Powers agree not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance." (Art. III, Hague Conv. 1907.)

The above exemption applies to vessels bringing in fresh fish, but not to those bringing in salted or cured fish.

Vessels charged with religious, scientific or philanthropic missions are likewise exempt from capture. (Art. IV, Hague Conv. 1907.)

Wanton Destruction of Religious, Charitable, Educational and Historic Buildings and Monuments

"In sieges and bombardments all necessary steps must be taken to spare as far as possible buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes." It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand. (Art. 27, Regs. Hague Conv. IV, 1907.)

Any military use of the edifice by the besieged (for instance, placing an observer therein) justifies its destruction by the besieger.

Attack on and Destruction of Hospital Ships

Military hospital ships, that is to say, ships constructed or adapted by states specially and solely with the view of aiding the sick, wounded and shipwrecked, the names of which have been communicated to the belligerent Powers at the commencement and during the course of hostilities and in any case before they are employed, shall be respected and can not be captured while hostilities last. These ships, moreover,

[1] *Infra*, p. 116.

are not on the same footing as warships as regards their stay in neutral ports. (3d Hague Conv. 1899, 10 Hague Conv. 1907, 1.)

"Hospital ships, equipped wholly or in part at the expense of private individuals or officially recognized relief societies, shall be likewise respected and exempt from capture, if the belligerent Power to whom they belong has given them an official commission and has notified their names to the hostile Power at the commencement of or during hostilities and in any case before they are employed. These ships must be provided with a document from the proper authorities declaring that the vessels have been under their control while fitting out and on final departure" (Art. 2, 2d Hague Conv. 1899, 3d Hague Conv. 1907, 1). Hospital ships equipped wholly or in part at the cost of private individuals or officially recognized societies of neutral countries shall be respected and exempted from capture, *on condition that they are placed under the control of one of the belligerents, with the previous consent of their own government and with the authorization of the belligerent himself, and that the latter has notified their name to his adversary* at the commencement of or during hostilities, and in any case before they are employed (3d Hague Conv. 1899, and Hague Conv. 1907, 1). The facts that the staff on a hospital ship are armed to preserve order or to defend the sick or wounded or that wireless telegraphic apparatus is aboard are no reasons for withdrawing the protection of the Hague Convention from such ship.

Breach of Rules Relating to the Red Cross and to Treatment of Sick and Wounded and Doctors, Nurses and Attendants Caring for Them

"The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention" (Art. 21, Regs. Hague Conv. IV, 1907; Art. 1, Chap. I, Geneva Convention).

Article 1. Officers, soldiers and other persons officially attached to armies, who are sick or wounded, shall be respected and cared for without distinction of nationality by the belligerent in whose power they are.

Article 2. Subject to the care that must be taken of them under the preceding article, the sick and wounded of an army who fall into the power of the other belligerent become prisoners of war, and the general rules of international law in respect to prisoners, become applicable to them.

These obligations of parties may be modified by mutual agreement.

Article 9. The personnel charged exclusively with the removal, transportation and treatment of the sick and wounded, as well as with the administration and establishments and the chaplains attached to armies, shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be considered as prisoners of war.

Article 12. Persons described (as above) will continue in the exercise of their functions, under the direction of the enemy, after they have fallen into his power. . . . When their assistance is no longer indispensable they will be sent back to their army or country within such period and by such route as may accord with military necessity. They will carry with them such effects, instruments, arms and horses as are their private property.

Chapter VI continues, "Out of respect to Switzerland the heraldic emblem of the Red Cross on a white ground, formed by the reversal of the federal colors," as the emblem and distinctive sign of the sanitary service of armies.

If military penal laws are insufficient, signatory governments undertake to take or to recommend to their legislatures the necessary measures to repress, in time of war, individual acts of robbery and ill treatment of the sick and wounded of the armies, as well as to punish, as usurpation of military insignia, the wrongful use of the flag and brassard of the Red Cross by military persons or private individuals not protected by the present convention.

It is forbidden "To make improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention." (Art. 23, Hague Conv. IV, 1907.)

Use of the Red Cross badge is governed by the above provision; and covering transports of munitions therewith, not medical stores, or a hospital train used to facilitate the escape of combatants or firing on the enemy from a place or vehicle or conveyance protected by such badge or symbol, or using any place or structure protected by such symbol as an observatory or military office or store, or for any acts of hostility, are unlawful and forbidden.

Poison

It is forbidden "To employ poison or poisoned weapons." (Art. 23, Regs. Hague Conv. IV, 1907.)

The above prohibition applies to the use of poisonous gases to injure an enemy or the civil population.

"The contracting parties agree to abstain from the use of projectiles, the sole object of which is the diffusion of asphyxiating or deleterious gases." (Hague Decl. 1899.)

"It is not thought justifiable to use chemical compounds which may maim or torture the enemy." (Dana's Wheaton, p. 428, note 166.)

"But the laws of nations, if not all, at least of the best, have long been, that it is not lawful to kill an enemy by poison" (Grotius, *De Jure Belli ac Pacis*, Vol. 3, Ch. 4, XV, p. 86).

"To employ arms, projectiles or materials calculated to cause unnecessary suffering" is forbidden (Art. 28, Regs. Hague Conv. 1907).

Directions to Give No Quarter

It is forbidden "*To declare that no quarter will be given* (Art. 23, Regs. Hague Conv. IV, 1907).

The rule is the same without the above declaration, but there are exceptions, namely, quarter may be refused for violations of the rules of warfare committed by the other side, and also in case of imperative necessity. Inability to feed and guard prisoners is not such necessity. The garrison and inmates of a fortress or place attacked and which is carried by assault, even though they have obstinately and uselessly defended against an overwhelming force, are entitled on surrender to receive quarter.

It is forbidden to declare that no quarter will be given, and on the

other hand, quarter can not lawfully be refused to an enemy who ceases to resist and gives up his arms. Except that quarter may be denied to an enemy who has personally violated the laws of war, who has declared his intention of refusing to grant quarter or of violating those laws in any grave manner, or whose government or commander has done acts which justify "such a reprisal," "or in case of imperative necessity" (See Oppenheim, Vol. 2, p. 147). But the fact that numerous persons can not safely be guarded and fed by the captors does not furnish a case of such necessity, provided that no vital danger to the captors is therein involved.

The fact that a fortress, a force or garrison unceasingly and uselessly defends against artillery or overwhelming forces and that the same are carried or captured by assault will not warrant the refusal of quarter to such force or garrison. Prisoners who can not safely be kept may be disarmed and liberated. They may not upon the chances of rescue be put to death.

Prisoners of War

"Prisoners of war are in the power of the hostile government, but not of the individual or corps who capture them. . . . They must be humanely treated. . . . All their personal belongings, except arms, horses and military papers, remain their property." (Art. 4, Reg. Hague Conv. IV, 1907.) (Above not operative unless all parties in war are parties to convention.)

It is forbidden to kill except as a punishment for crime or to treat with inhumanity prisoners of war. They must not be sold into slavery or impressed into the military or naval service of the captor. They must be allowed their personal property of a non-warlike nature, but such property or funds as might facilitate escape or unreasonably interfere with transport or safe custody may be taken possession of temporarily by the captor and restored on their liberation.

The above provisions will not protect subjects of the captor captured while fighting with the enemy. Prisoners who commit crimes or acts punishable according to the ordinary penal or military laws, are subject to the military jurisdiction of the state of the captor. Prisoners of war must not be subjected to avoidable danger and so should not be placed in a noxious or unsanitary situation or one which endangers life or health. The imprisonment of prisoners of war is not penal. It should not, in the absence of misconduct, be punitive or accompanied by indignities, but warrants merely such restraint as is necessary for safe custody. Close confinement is only permissible under exceptional circumstances, as after an attempt to escape or if there is reason to expect such attempt. The captor is charged with the maintenance of prisoners of war and the maintenance, food and clothing should be analogous to the maintenance of his own troops on a peace footing. There is no positive obligation to exchange prisoners. They may be required to work for the benefit of the captor government according to their rank and condition, but not to do military work having direct relation to the war. Sick or wounded prisoners shall be medically treated according to the ability of the captor's medical staff. Prisoners of war may be released upon parole if the laws of their country authorize them to give this parole. If so released, they must scrupulously observe the condition of such

parole and their own government is bound neither to request or accept service inconsistent therewith. The penalty for breach of parole customarily allowed by international law may be capital.

Captivity may be ended by release without parole, release with parole, by successful flight, liberation by the forces of the captive's country or its allies, by exchange of prisoners, by prisoners being brought into neutral territory by the captor, lastly, by the war coming to an end.

Employment of Prisoners of War

Prisoners of war may be employed by the captor on work having no direct connection with the operations in the theatre of war, but they may not be employed on works directly connected with the operations of the theatre of war. Work under fire or in situations of especial danger can not be required of them.

Flags of Truce

A flag of truce is in its nature of a sacred character, and the use of it to obtain knowledge or information surreptitiously against the interest or wishes of an enemy is to abuse it, and may subject the bearers to detention and, in extreme cases, to punishment as spies. It is forbidden to use the same in bad faith, treacherously or as a stratagem to mislead the enemy. To fire upon or commit acts of violence and hostility against the enemy under cover of a flag of truce is a grave breach of the laws of war and may warrant the most serious reprisals. There is no absolute obligation to receive a flag of truce under all circumstances. If it is exhibited as a token of submission, and if the force exhibiting it desist from all acts of hostility or resistance, firing and attacks on the other side should cease.

Poisoning of Wells

It is forbidden to poison wells, springs, waters or any kind of food. Also to introduce infectious or contagious diseases for the purpose of injuring an enemy. Except by the Hague Convention, it is not forbidden to drain or destroy the water supply of the enemy in order to overcome or reduce him or to hinder his operations, nor to publicly pollute and foul the same and make it unusable, as by placing the dead bodies of men and animals therein. Such pollution is, however, forbidden by the Hague Convention, Chap. IV, 1907.

Your committee respectfully submit the above as the scant results of a labor but just begun, they having no opportunity to meet or consult until the present assembly of the Society. They further take the liberty to express the opinion that the codification of international law is a labor too vast and too exacting to be undertaken casually in the midst of other employments, even by ripe and accomplished scholars therein; that in their opinion it must be confided to a small commission of competent persons who shall give their whole time thereto and who in justice should be reasonably compensated.

Your Committee asks leave to file the above as a report of progress, subject to modification and to the criticism and suggestion of members after the same has been more fully examined.

Respectfully submitted,

CHAS. NOBLE GREGORY,
AMOS S. HERSHEY,
DAVID JAYNE HILL,
GEORGE A. KING,
CHARLES B. ELLIOTT.

EXHIBIT A

VISIT, SEARCH AND CAPTURE

The American statement of international law on this general subject may be found in the Instructions for the Navy of the United States Governing Maritime Warfare, which was issued on February 8, 1917, before the entry of the United States into the war. By these instructions liability to capture was defined as follows:

ENEMY VESSELS

65. Enemy vessels are liable to capture outside of neutral jurisdiction.

NEUTRAL VESSELS

68. A neutral private vessel is in general liable to capture if she:

(a) Attempts to avoid visit and search by flight, but this must be clearly evident; or resists with violence.

(b) Presents irregular of fraudulent papers, lacks necessary papers, destroys, defaces, or conceals papers.

(c) Is guilty on account of contraband, except when permitted by treaty to surrender ("deliver up," "deliver out") contraband.

(d) Is guilty on account of blockade.

(e) Is guilty on account of unneutral service.

(f) Is under enemy convoy; or fraudulently under neutral convoy.

There are certain exceptions among enemy vessels including cartelships, vessels on religious, scientific, or philanthropic missions, hospital ships, vessels exempt by treaty or special proclamation, or small coast fishing vessels. No neutral private vessel is liable to capture by Article 68 without previous visit and search, except in the case where she attempts to avoid visit and search by flight or resists with violence.

The rules for visit and search are given below:

HOSTILE ACTS, VISIT AND SEARCH

12. All acts of hostility, including capture and the exercise of the right of visit and search, committed by belligerent warships in the territorial waters of a neutral Power, constitute a violation of neutrality and are strictly forbidden.

WHERE AND WHEN EXERCISED

44. The belligerent right of visit and search, subject to exemptions mentioned in Section VII, may be exercised outside of neutral juris-

diction upon private vessels after the beginning of war in order to determine their nationality, the character of their cargo, the nature of their employment, or other facts which bear on their relation to the war.

METHOD OF EXERCISE

45. The right should be exercised with tact and consideration, and in strict conformity with treaty provisions, where they exist.

46. Subject to any special treaty provisions the following procedure is directed.

47. Before summoning a vessel to lie to, a ship of war must hoist her own national flag. The summons shall be made by firing a blank charge (*coup de semonce*), by international flag signal, or by both. The summoned vessel, if a neutral, is bound to stop and lie to, and she should also display her colors; if an enemy vessel, she is not so bound, and may legally even resist by force, but she thereby assumes all risks of resulting damage.

48. If the summoned vessel takes to flight she may be pursued and brought to, by forcible measures, if necessary.

49. When the summoned vessel has brought to, the ship of war shall send a boat with an officer to conduct the visit and search. If practicable a second officer should accompany the officer charged with the examination. There may be arms in the boat, but the boat's crew shall not have any on their persons. The officer (or officers), wearing side arms, may be accompanied on board by not more than two unarmed men of the boat's crew.

50. The boarding officer shall first examine the ship's papers in order to ascertain her nationality, ports of departure and destination, character of cargo, and other facts deemed essential. If the papers furnish conclusive evidence of the innocent character of vessel, cargo, and voyage, the vessel shall be released; if they furnish probable cause for capture she shall be seized and sent in for adjudication.

51. If the papers do not furnish conclusive evidence of the innocent character of the vessel, the cargo, and voyage, or in case of suspicion, the boarding officer shall continue the examination by questioning the personnel or by searching the vessel or by examining her cargo. If such further examination furnishes satisfactory evidence of innocency, the vessel shall be released; otherwise she shall be seized and sent in for adjudication.

52. The boarding officer must record the facts concerning the visit and search upon the log book of the vessel visited, including the date when and the position where the visit occurred. This entry in the log must be made whether the vessel is held or not.

53. . . . The evidence furnished by the papers against a vessel is conclusive. Regularity of papers and evidence of the innocence of cargo or destination furnished by them are not necessarily conclusive, and if doubt exists a search of the ship or cargo should be made to establish the facts. If a vessel has deviated far from her direct course, this, if not satisfactorily explained, is a suspicious circumstance warranting search, however favorable the character of the papers.

Following visit (and if necessary search) the rules for disposition are as stated in Articles 50 and 51 quoted above, *i. e.*, seizure and sent in for adjudication, and also as given in Articles 80 to 83 inclusive:

80. The act of capture shall be signified by hoisting the United States flag on board the vessel seized.

81. In case the prize is an enemy vessel, the flag of the United States shall be flown at the usual place (peak or staff) over the enemy flag.

82. If the prize is a neutral vessel, the neutral flag shall be flown as usual until she is adjudged to be a lawful prize by a competent court; the flag of the United States, however, shall be exhibited at the fore to indicate that she is for the time in the possession of officers of the United States.

83. Whenever the colors are displayed the procedure of the two preceding articles shall be followed thereafter during the passage of the prize to the United States port and while under the control of the prize-master in such port.

The case of destruction of prizes is given in Articles 104 to 109 inclusive:

104. Since title to a captured enemy vessel vests in the captor's government by virtue of the fact of capture, enemy ships made prizes may be destroyed in case of military necessity by the capturing officer when they can not be sent or escorted in for adjudication.

105. The responsibility of the officer ordering the destruction exists solely to his own government, except in so far as the interests of the owners of neutral cargo on board the prize are concerned. If circumstances permit, it is preferable to appraise and sell the prize rather than to destroy it. This is permitted by Section 4615, Revised Statutes, already quoted.

106. Before destroying an enemy prize, the safety of the personnel on board and, if practicable, of their personal effects must be ensured, and all the documents and papers of the prize mentioned in Section 4615, Revised Statutes, shall be taken on board the capturing vessel of war and be inventoried and sealed in accordance with the procedure of that section for delivery to the prize court, with especial view to the protection of the interests of the owners of innocent neutral cargo on board, if such exists.

NEUTRAL PRIZES

107. In general, if neutral prizes can not be sent or escorted in for adjudication they should be released. This instruction is not made absolutely mandatory, because neither by international law nor by the statutes of the United States is the destruction of neutral prizes forbidden. The responsibility of the capturing officer for the destruction of a neutral prize is, however, so serious that he should never order such destruction without being entirely satisfied that the military reasons therefor justify it under circumstances such that the prize can neither be sent in nor, in his opinion, properly released.

108. In the exceptional case of the destruction of a neutral prize, before such destruction takes place, the safety of all persons on board the prize and as far as conveniently possible the security of their personal effects must be ensured. Likewise all the vessel's papers and

other documents which those interested consider relevant and which are necessary for a decision by the prize court as to the validity of the capture shall be secured by the captor to be forwarded to the court.

REPORT OF DESTRUCTION OF PRIZE

109. Every case of destruction of prize shall be reported to the Navy Department at the earliest practicable moment.

From these rules, either by mandatory statement or a statement of a prohibitive nature, or else by inference, the following general principles emerge:

(a) In general the making a prize of the vessel must be preceded by a visit, supplemented by search if necessary.

(b) The visit and search must be accomplished under certain formalities and also under certain restrictions as to the numbers of the visiting personnel and their equipment with arms.

(c) When probable cause for capture is found the usual and proper course is to send the detained vessel in for adjudication with a prize crew in charge or else under convoy.

(d) No provision is made for any rules recognizing a right to send vessels into port for examination. The evident intent of the rule being that such an examination should take place on the high seas.

(e) Destruction without visit is unauthorized.

(f) Destruction after visit and the discovery of probable cause is recognized as permissible under certain circumstances.

(g) Destruction of enemy prize is more permissible than destruction of neutral prize.

(h) In any case the safety of the lives of the persons on board the captured vessel must be assured and the ship's papers must be saved.

The entire body of rules contemplates an orderly adjudication by a competent court and not a hasty and final adjudication by the officer making the capture at the time thereof.

Chairman LANSING. I do not know what the pleasure of the meeting is as to taking any action on the subcommittees' reports, but it is provided that action shall be taken upon them, I think, by tomorrow morning. I assume that these subcommittees report to the general committee and that the general committee will act before the subcommittee's reports go to the Society.

(The Chairman at this point read a letter from the Committee on Commerce, Trade and Commercial Law of the American Bar Association inviting the members of the Society to attend a public meeting of the committee in New York, May 2–4, next, and take part in the discussions.)

Chairman LANSING. The next in order is the report of Subcommittee No. 2. In the absence of Dr. Judson, who, I understand, was obliged to leave today, the report will be read by another member of the subcommittee, Admiral Charles H. Stockton.

Admiral STOCKTON read the following report:

REPORT OF SUBCOMMITTEE NO. 2

To formulate and agree upon the amendments and additions, if any, to the rules of international law shown to be necessary or useful by the events of the war and the changes in the conditions of international life and intercourse which have followed the war.

Gentlemen:

Your Subcommittee No. 2 hereby presents its report and recommendations.

The committee has confined itself to questions involving amendments to existing rules of international law.

Very many suggestions have been made to the subcommittee and have received careful consideration. It has seemed advisable to the subcommittee to make at this time only a small number of suggestions and those mainly bearing on the possibilities of the Court. The committee assumes that the Society will appoint another committee or committees which may take into consideration the questions approved by the General Committee at this time and such other questions as may seem desirable, for careful study and possible detailed report to the Society at its next annual meeting.

The following are the suggestions made:

1. RESPONSIBILITY

A proper classification of illegal acts of states for which they may be held responsible, with proper penalties and remedies.

2. TRANSFER OF TERRITORY

How far should residents have a voice to make such transfers legal?

Do the traditional sources of good title need modification?

3. FREE ACCESS TO THE SEA

Can states be secured freedom of transit in international rivers, subject to reasonable control by riparian states?

4. PROTECTION OF PRISONERS OF WAR

Various modifications and additions in the Hague regulations of 1907 seem desirable. The committee has not thought best to embody specific suggestions, leaving those for the consideration of the committee which may take up these details for a later meeting.

5. NEUTRAL PRIZES

More definite rules are needed governing the treatment of neutral prizes brought by a belligerent into a neutral harbor.

6. THE STATUS OF GOVERNMENT VESSELS

a. Owned by a government.

b. Requisitioned by a government.

c. Used for strictly public purposes.

d. Used in whole or in part for commercial purposes.

e. As to neutral governments or individuals in war.

f. As to co-belligerent governments or individuals in war.

g. As to other governments or individuals in war.

The General Committee will notice, as has been said, that the subcommittee has in general refrained from suggesting specific forms of amendment, believing that these topics need far more extended and detailed study than has been possible for the subcommittee at the present time.

Respectfully submitted,

HARRY PRATT JUDSON,
Chairman.

Chairman LANSING. The next report will be by Subcommittee No. 3. The chairman of that committee is Governor Simeon E. Baldwin, and he requests that the report be read and presented by Professor George G. Wilson.

Professor WILSON read the following report:

REPORT OF SUBCOMMITTEE NO. 3

To endeavor to reconcile divergent views and secure general agreement upon the rules which have been in dispute heretofore.

In reviewing the interpretation of international rules, the subcommittee finds divergence of opinion upon many points.

Typical of this divergence are:

(1) The forms and requisites of declarations of war since 1914;

(2) The effect of war upon treaties, *e. g.*, opinions concerning the force of the treaty between the United States and Prussia of 1785 and 1828;

(3) The rules of land warfare, *e. g.*, the controversies concerning the application of Art. XXIII (h) of the Fourth Hague Convention of 1907;

(4) Problems of maritime warfare, *e. g.*, the abolition of the distinction between absolute and conditional contraband, and the extension of the doctrine of continuous voyage.

The following suggestions have been made:

(a) That outside of neutral jurisdiction, the ultimate destination of a neutral vessel or cargo determines the liability of either to condemnation.

(b) That there should be considered the abandonment of the doctrine of conditional contraband, specifically with reference to the treatment of foodstuffs.

(c) That there should be considered the feasibility of a general agreement concerning the operation and effect of neutral governmental certification of the non-hostile uses of neutral foodstuffs destined to hostile territory, as a safeguard against capture and condemnation.

Chairman LANSING. Subcommittee No. 4 is next in order. The chair-

man of that subcommittee is Mr. Paul S. Reinsch, recently head of our diplomatic service in China.

REPORT OF SUBCOMMITTEE NO. 4

To consider the subjects not now adequately regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted.

Dr. REINSCH. Mr. Chairman, the committee made a selection from a large number of topics with a view, not of covering the field, but of selecting topics upon which, in our opinion, attention has to be concentrated.

We have had in mind also the fact that in international law as it has hitherto been treated in text-books and in general discussions, there has been but a very small part that could be described as law in the sense of being universally accepted and recognized rules that must be followed; and a great deal of the material thus treated consisted of precedents or the practice of this or that state, without presuming or pretending to be a rule imposed by all upon each other by their common will. So in outlining this program we have not felt so much that a code or a codification of individual parts could immediately be produced, but that it was necessary to review the material with the purpose of focusing the knowledge thus gained upon a clear statement of principles that might recommend itself to the representative publicists and the governments as constituting rules which could be generally applied and would be generally accepted.

Now, with that in view we have divided these topics that we have selected out of the multitude of material, into three classes, having in view the fact that the committee desires to work for the advancement of international law in the application of that law by an international tribunal. Therefore, we have put into class one those topics upon which we believe that an early formulation of at least a certain number of definite rules is advisable. We have put into the second class those topics which will require, while they are in some cases more important even than the individual topics in class one, more time and more research before an adequate basis is found for making such proposed rules. In the third class we have placed those topics concerning which we had some doubt to what extent it would be possible to find a basis for general rules but which seemed to merit study with that idea in view.

I shall now read to you the list of topics, with no commentary except in one or two cases. I might state that on several of these topics material was presented to the subcommittee, but it was felt that the committee had too short a time for a weighing of these materials, that they should be made a part of the *res gestae* and not brought up for discussion at this time.

The topics under the first class are:

(1) The grounds upon which intervention is justified, and the various forms which intervention may take. (It therefore deals both with the substantive law and the law of procedure in the matters of intervention.)

(2) Qualified and full recognition of governments and states. (This includes, therefore, four topics, qualified recognition of governments and full recognition of governments, and the same for states.)

(3) The question of extradition, including the definition of political offenses.

(4) The treatment and protection of domiciled aliens, including their eligibility and liability to military service (which has recently been one of the questions calling for consideration).

(5) The jurisdiction of the air. (A paper was presented on this subject last night.)

(6) Definition of the rights and immunities of consuls and other foreign agents. (Those immunities are now entirely based upon courtesy without any universally binding custom.)

(7) The more specific definition of the rules of international law applying to the instrumentalities of international electrical communications by cable, telegraph and radio. (A part of that topic was treated last night, and some resolutions in connection with that paper were submitted to the committee.)

Under the second class there are the following subjects which to us seemed to be very important, requiring, however, considerable investigation before there could be any assurance with respect to a suggestion of universally accepted rules.

(1) General policy of the open door, with particular reference to the control of the production and distribution of the chief raw materials; utilization of capital in the development of backward countries; prevention of discrimination in international railroad rates, customs tariffs, etc.

(2) The listing of offenses which may be properly characterized as international crimes, and procedure for their prevention. (That is, in the mind of the subcommittee, crimes against the general rights of humanity, and such as are under special international arrangements already punishable or forbidden by international arrangements, as, for instance, the conventions concerning slavery, white slavery trade, etc.)

(3) International administrative unions, their organization, their procedure, their relations to each other.

Under class three, we have placed the subjects which the subcommittee believes should be studied with a view to determining whether or not they may be brought within the realm of law. They are the following:

(1) The international regulation of monopolies and combinations in restraint of trade.

(2) Espionage in time of peace.

(3) The applicability of the theory of state equality to modern political conditions, and in modern international organization (referring particularly to the equality of states in international unions or in the League of Nations, and all the questions connected therewith.)

(4) Naturalization and expatriation (involving the dual citizenship problem).

(5) The right of asylum, in legations, consulates and on ships.

(6) The avoidance of multiple taxation, through international agreement.

That completes the list which we suggest for work in the immediate future.

I might state that the subcommittee felt that emphasis should be placed upon the normal relations of states, and that while we proceeded with the development and elaboration of the rules relating to war, after all, the important thing now is to facilitate normal relations between different countries by making the rules, regulations and laws of such a nature as to facilitate intercourse and the building up of common interests. We therefore felt that it would be desirable for the Society to give emphasis to these rules of normal life, on the basis of which we hope there may be built up, gradually, slowly, but with a certain and unfailing growth, a feeling of solidarity throughout the civilized world, which is now practically the entire world. Such a feeling would be the best safeguard against war, because unless we have, even back of our laws of war, that feeling of human solidarity that looks upon a breach of the laws of war, as an offense and a crime, then we shall be building very largely in vain. It is therefore that your fourth subcommittee commends these topics to your very particular attention.

(At this point Hon. OSCAR S. STRAUS took the chair.)

Mr. GEORGE W. KIRCHWEY. Would it be permitted to ask a question of Dr. Reinsch, the Chairman of the Subcommittee No. 4, in connection with the report?

Chairman STRAUS. Certainly.

Mr. KIRCHWEY. Subcommittee No. 4 is to consider the subjects not now adequately regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted. I suppose the omission of any plan for a league or an association of nations, which is the one vital question, was deliberately omitted. I suppose that was deliberate; that there was some reason why the committee thought it inexpedient and inadvisable to omit the one topic which is in the minds of all of us, and which I imagine the American community will expect us to have some opinions upon. My point is that some form of international association, some form of coordinated, organized international intercourse seems to be impending, and there is certainly a fair question as to whether this American Society of International Law is not competent to express some opinion as to what form the organization should be, or at any rate to possibly even advise as to what form of organization would, in its opinion, be feasible or desirable. I do not make that so much in the form of a suggestion as I do as a question addressed to Subcommittee No. 4, which appears to me the only one of these four subcommittees into whose jurisdiction that would seem to fall.

Dr. REINSCH. I might state that the matter was not taken up by the subcommittee at all, and I can therefore only speak for myself as to why it did not occur to me as a member of the committee to suggest that it be taken up. The present effort of organization of the world into a league of nations is, after all, an outgrowth and a very direct one of the Hague Conferences, and very closely connected with them. That is a very big subject, one on

which a great deal has already been done and which did not seem to fall, for that reason, into the frame of limitations which have been laid down for the work of this subcommittee. It seemed also a very important subject that would probably require special action, would require by itself the work of a committee, and the Society or its officials could have hardly intended to have that listed among a number of specific topics such as I have read to you. I do not know how the other members of the subcommittee feel.

Chairman STRAUS. Is there any other member of the subcommittee here who wants to say something on that topic?

Professor EUGENE WAMBAUGH. The reason it was not taken care of by the subcommittee was because it was not part of the work assigned to the subcommittee. The subject is: "The subjects not now adequately regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted." There are two organizations at the present time regarding this Society of Nations. One is the League of Nations, which has been operating for more than a year. It would have been an impertinence for this subcommittee to have gone outside the existing adequate machinery to suggest new machinery when the subcommittee was not asked so to do.

Chairman STRAUS. Tomorrow morning, as all of you know, and can see by the program on page 4, there will be consideration of, and action upon reports of the Subcommittees on Advancement of International Law. There will be afterwards a business meeting, then the adjournment of the Society, then a meeting of the Executive Council, and at 7.30 o'clock in the evening the banquet in this room.

Ladies and gentlemen, this closes the program for this evening. I therefore declare this session adjourned.

(Thereupon, at 10:30 o'clock p. m., an adjournment was taken.)

FIFTH SESSION

Saturday, April 30, 1921, 10 o'clock, a. m.

The Society met at 10 o'clock a. m., Hon. Elihu Root, presiding.

President ROOT. The Society will come to order. The first item of business this morning is action on the reports of the Subcommittees for the Advancement of International Law. Is there any action proposed upon those reports?

Mr. CHARLES HENRY BUTLER. I do not know if it is in order at this particular time, but the appointment of the Committee for the Advancement of International Law covers the domain of codification, and, therefore, I move that the Committee on Codification be discharged and the questions entrusted to it for consideration be transferred to the Committee on the Advancement of International Law. The members of that committee are all on the other, so it would be useless to have two committees.

President ROOT. Does anybody object to that?

Mr. FREDERIC R. COUDERT. I second the motion.

President ROOT. You have heard the motion. All in favor will signify the same by saying "Aye"; those opposed, "No." It is so ordered.

Is there any proposal for action by the Society upon the reports of the subcommittees which were rendered and discussed yesterday evening? Does any gentleman wish to discuss those reports?

Mr. BUTLER. I move that the reports of the subcommittees as presented last night be taken collectively as the report of the committee to the Society.

The motion was seconded.

President ROOT. All in favor of that motion will so signify by saying "Aye"; contrary, "No." It is agreed to.

Is there any further action proposed? What shall be done with the report of the Committee on the Advancement of International Law?

Mr. BUTLER. I move that the reports be received and filed and the committee continued, with the request to proceed with its work.

The motion was seconded.

President ROOT. All in favor of that proposition will signify the same by saying "Aye"; contrary, "No." It is so ordered.

The next in order is the report of the Committee on Nominations.

Mr. ARTHUR K. KUHN. We are ready to report this morning, Mr. President. The report will be read by Mr. Dean.

REPORT OF THE COMMITTEE ON NOMINATIONS

To the Members of the American Society of International Law:

Your Committee on Nominations respectfully submits the following nominations of officers of the Society for the ensuing year:

For Honorary President

The Honorable WARREN G. HARDING,

President of the United States.

For President

Honorable ELIHU ROOT.

As Vice-Presidents

Hon. SIMEON E. BALDWIN	Hon. ROBERT LANSING
Justice WILLIAM R. DAY	Hon. HENRY CABOT LODGE
Hon. JACOB M. DICKINSON	Hon. WILLIAM W. MORROW
Hon. GEORGE GRAY	Hon. HORACE PORTER
Hon. DAVID JAYNE HILL	Hon. OSCAR S. STRAUS
Hon. P. C. KNOX	Hon. WILLIAM H. TAFT

Chief Justice WHITE

We respectfully recommend that the Society adopt a resolution increasing the number of Vice-Presidents to eighteen, and for the five additional Vice-Presidents we nominate:

Hon. CHARLES E. HUGHES	Former Senator GEO. SUTHERLAND
Mr. CHARLES NOBLE GREGORY	Mr. EVERETT P. WHEELER

Mr. THEODORE S, WOOLSEY.

As members of the Executive Council:

TO SERVE UNTIL 1922

Hon. CHANDLER P. ANDERSON, N. Y.	Mr. JACKSON H. RALSTON, D. C.
Mr. CHARLES HENRY BUTLER, D. C.	Mr. JAMES BROWN SCOTT, Md.
Mr. CHARLES C. HYDE, Illinois.	Prof. GEORGE G. WILSON, Mass.
Mr. GEO. W. KIRCHWEY, New York.	Mr. LESTER H. WOOLSEY, N. Y.

TO SERVE UNTIL 1923

Mr. FREDERIC R. COUDERT, N. Y.	Prof. JOHN H. LATANÉ, Md.
Mr. WILLIAM C. DENNIS, D. C.	Prof. WM. R. MANNING, Texas.
Hon. HENRY P. FLETCHER, Pa.	Hon. FRANK C. PARTRIDGE, Vt.
Hon. HARRY A. GARFIELD, Mass.	Hon. LEO S. ROWE, Pennsylvania.

TO SERVE UNTIL 1924

Hon. JOHN W. DAVIS, New York.	Hon. JAMES L. SLAYDEN, Texas.
Prof. AMOS S. HERSHEY, Ind.	Admiral CHARLES H. STOCKTON, D. C.
Hon. A. J. MONTAGUE, Virginia.	Mr. CHARLES B.WARREN, Mich.
Hon. FRED K. NIELSEN, Neb.	Prof. PHILIP MARSHALL BROWN, N. J.

Respectfully submitted,

(Signed)

CHAS. RAY DEAN,
ARTHUR K. KUHN,
J. S. REEVES.

April 30, 1921.

President ROOT. What is the pleasure of the Society in respect of this report? Are there any other nominations to be made for the officers covered by the report on nominations?

Mr. HARVEY. Mr. President, I move the adoption of the recommendation of the committee that the number of Vice-Presidents be increased to eighteen, and that the nominations of the committee be accepted as those of the Society.

The motion was seconded.

President ROOT. All in favor of the increase of the number of Vice Presidents to eighteen, and the acceptance of the report of the Committee on Nominations will signify the same by saying "Aye"; contrary, "No." The motion is agreed to.

ELECTION OF OFFICERS

The election of officers is now in order. The question is upon the election of the persons nominated by the Committee on Nominations for Honorary President, President, Vice Presidents, and members of the Executive Council.

As there are no nominations other than those reported by the Committee, I will put the question directly upon those nominations.

All in favor of the election of the persons reported by the Committee on Nominations to the respective offices for which they are nominated, will say "Aye"; contrary, "No."

They are unanimously elected.

AMENDMENT OF THE CONSTITUTION

There is on the agenda as the fourth item of business the amendment of the Constitution pursuant to the following recommendation of the Executive Council adopted November 13, 1920.

> *Resolved*, That the Executive Council recommends to the Society the amendment of the Constitution by striking out the word "publications" in the third line of Article III, paragraph 2, and inserting in lieu thereof the words, "American Journal of International Law."

Is the Society ready for the question upon that recommendation? All in favor of the amendment will say "Aye"; contrary, "No."

It is agreed to.

The provision now reads:

> Each member shall pay annual dues of five dollars and shall thereupon become entitled to all the privileges of the Society, including a copy of the American Journal of International Law issued during the year.

MISCELLANEOUS BUSINESS

Miscellaneous business is now in order. Is there any miscellaneous business to bring before the Society?

The Chair wishes to say one thing which probably comes under the head of miscellaneous business. It is that an index of the first fourteen years of the JOURNAL, SUPPLEMENT and PROCEEDINGS, has been in course of preparation for a considerable period, following the action, I think, of the Executive Council at its meeting two years ago.

Mr. Finch has been devoting great and discriminating labor to the preparation of that index, which will in various forms be adapted to enable anybne to find there any article or any particular document or the treatment of any topic. In my humble judgment that index will multiply the value of the JOURNAL about ten times.

You will recall that the JOURNAL happened, without anybody's thinking about it, to begin just as Moore's *Digest of International Law* was completed. I did not think of it at that time, as I was busy with the arrangements for completing the printing and publication of Moore's *Digest* in the State Department when we were starting this Society, so that the fourteen years of the AMERICAN JOURNAL OF INTERNATIONAL LAW which, as I have already told you on previous occasions, is declared to be the best journal of international law in any language, continues the history of diplomacy at the point where Moore's *Digest of International Law* ends, and the two cover the entire record.

With this index, which itself will be a work of the greatest value to anyone who has any interest in or curiosity about any question of international law, we will have a complete conspectus of the progress and events of international law from the earliest beginnings of our Government.

I hope that the members of the Society will not fail to acquaint all persons who are interested in the subject, and who are qualified to be leaders of opinion on the subject, with the fact of this immense increase in the value of the means afforded by the Society for correct information upon all topics relating to the rights and duties of nations.

Is there any further business?

Professor GEORGE G. WILSON. I think there was some proposition in regard to an amendment of the Constitution on which it was proposed to give notice at this meeting. Perhaps the Secretary has that.

The Recording Secretary (Mr. JAMES BROWN SCOTT). The Executive Council adopted, at its meeting of the 28th instant, a resolution to the effect that hereafter no member of the Executive Council shall be eligible for re-election until a year after the expiration of the term of office for which he had been elected. It was not intended to deprive the Society of the services of its administrative officers, and the matter was therefore referred to the Executive Committee in order to have the resolution properly drafted and embodied in Article IV of the Constitution, where it belongs.

The purpose of the amendment is obvious, but it is better to state it that there may be no doubt about it. Experiences of other societies have shown, and we cannot hope to be an exception, that the re-election of the

same members, without an interval, tends to perpetuate control in a body which becomes conservative, and which comes to feel that it has a vested right in looking after and, in the language of the Constitution, taking charge of the affairs of the Society. The proposed amendment of the Constitution, if adopted, will require an interval of at least one year. None of the outgoing members of any class can be elected to succeed themselves. Whether they will be elected at a later time, will doubtless be determined by the appreciation which the members of the Society have of the services which they have rendered in times past, or which it is believed they may render in the future. The fact, however, that members of the Council are elected for three years is an assurance that the Society will always have a nucleus of experienced members in the Council.

It should, I think, be a source of satisfaction that the proposal for an amendment of this kind should not have been suggested from the outside, or upon the floor, but that it should have originated with the members of the Executive Council. They feel that in the interest of the Society a change of this kind is of fundamental importance, and they have therefore proposed it, although they are to be affected by its operation.

President ROOT. Is there any further business?

Professor ALBERT BUSHNELL HART. May I be allowed the floor for a few minutes?

President ROOT. Certainly.

Professor HART. Mr. President, I discovered when I came into this meeting a feeling of nervous hesitation and sense of not having on a wedding garment. Nevertheless, I should like in a few words to propound some convictions on matters not touched upon during this session. No person feels more grateful for the work and the publications of this Society than I,—I live upon them. I examine them from issue to issue with absorbing interest. I have founded my limited knowledge of international relations to a considerable degree upon the studies thus made available. The Society has been of inestimable value not simply to the progress of international law, but to an understanding of international intercourse and to the development of the science of international law and the subject of diplomacy throughout the country.

May I, therefore, having acknowledged the debt, say that I wish that the meeting might have been livelier? In earlier meetings of this Society held here in Washington and under like auspices, there has been a freedom of discussion which I have not been privileged to witness here. It has seemed to me, to phrase it in a harsh and crude way, that the object of this Society seems to be to save the world by a series of doctor's prescriptions; that we have come to a point where we feel far more the importance of codification than of realization.

Most of the papers and reports to which I have listened, however full of wisdom and full of suggestion, seem to me to hark back to a stage of the

world in which we no longer live. There are few suggestions that international law is a steady growth, like every system of law, an accretion, which discusses and attempts to remedy its own deficiencies, and then new deficiencies arise. In the constant growth of precept added upon precept, the whole thing comes down in the last resort to, what is the state of the whole world? All our deliberations, all our researches in the long run must be based upon the globe on which we live in 1921. With regard both to the laws of peace and the laws of war, the world of 1921 is farther away in many respects from that of 1914 than the world of 1914 was from that of 1864. That is, the fundamental principles upon which we depend have gone through more change, they have suffered more disruptions in seven years than in the fifty years previous, or indeed in a hundred years.

I listened to a professor of international law in Berlin years ago, who stated that international law ceased in the time of Napoleon, and that all the international law we now have has been produced since that time. After all, there is a good deal of truth in that view; and the international law of the next fifty years will not start from 1914 but from 1921. May I, therefore, take a few minutes to suggest some of the directions in which the fundamental basis of international law has already shifted.

First the international law of peace. The world has accommodated itself during the last century to a system of wholesale removal of persons from one country to another. The United States is the most conspicuous example of the recipients of such an influence; so that, leaving out of account the negroes, one-half of the population of the United States harks back to ancestors who were not in the United States a hundred years ago. That principle has also been exemplified in Canada, Australia and New Zealand, and in some of the South American countries. The United States of America in 1868 by a formal statute obligated itself to recognize the right of expatriation. According to that statute the right of a person to leave his own country in order to go to another is assured; but the allied right of the individual to be received by another country and to transfer his citizenship is one which, when invoked by persons, by nations and by races very different from their new land, may become a terrible menace to civilization.

For instance, in our present relations with the Japanese, the most serious national difficulty is that the Japanese take us at our word, as expressed in the doctrine of 1868. An American citizen is free to leave his own country; and we expect that, if he complies with the conditions of citizenship in another country, he may complete expatriation and forfeit his American citizenship. Yet we do not admit that as a general principle for immigrants, nor as a right of the Japanese,—a high-spirited and proud people, who do not appreciate that difference in our external and international law.

Again, the principle of small nations and the respect for small nations have undergone a very great change in the past few years. That is particularly due to the fact that there can no longer be any Thermopylae.

That is, the art of war is in such a situation that the bravest nation with the strongest forearms and the most accurate throw of the javelin, is not protected from a larger nation supplied with the modern appliances of war. Up to a few years ago a country like Sweden, we will say, had very considerable power of self-defense. The Swiss have been able to assert a military potentiality which has been respected by other nations.

That time has gone by. You cannot imagine Serbia or Jugo-slavia or the present Hungary or Poland long resisting any first class Power, directed solely against it without alliance. Small nations henceforth, far more than in any previous time, depend upon the good will, the friendship and the international courtesy of other nations. We seem strangely unwilling to admit this fundamental difficulty in forming any League of Nations. That difficulty is that no nation on earth, large or small, is willing to accept definitely and completely either the principle of equal representation by nations or the principle of representation in proportion to population.

All the world knows that the United States happily solved that difficulty in forming the Federal Constitution which went into effect in 1789, by its creation of a Senate and House of Representatives; but the constituent members of the United States under that Constitution were already gathered in a national government, and not one of them was sovereign. Even in the United States we are now struggling with deeply rooted national instincts which did not exist in the union of 1789.

Throughout the world we find a new adherence to the principles of race and nationality; and at the same time an increasing group of states which are unable to maintain themselves in the teeth of the conditions of our times; for example, the little states that were swept into the present war, some of them absolutely against their will. Portugal had no direct interest in the war: its interest was to satisfy England, which for more than a century has been a kind of "padrone."

Again, the international law of war, both on land and on sea, rests on very different footings from those of ten years ago. Take a subject which has been discussed here, with much learning and with great suggestion, the question of humanity in the art of war. On this subject the world has gone through various stages. The original method of war was to hit as hard as you could, and if any of your enemy were left, to drag them home as captives. That was a principle of international law which was part of the public law of the Romans. They had a system which a few of the modern nations would find very convenient, namely, when you have once conquered a troublesome adversary, put him out of the game. Augustus overcame the Alpine tribes, discovered that they were very self-defensive and hence to his point of view, undesirable citizens; and he proceeded to exterminate them and bring in Roman colonists. By that process he extinguished a nation and removed an international difficulty. At present, mankind is not prepared to accept that method, though it is being applied at this moment

by the Bolshevists on the frontiers of Russia. In various parts of Eastern Europe the distinct idea has arisen of wiping out a population which might in future be troublesome.

The amelioration of war depends as an international obligation upon one bottom principle—namely, what is the use of killing women and children, inasmuch as when they are dead your army is no stronger? What is the use of attacking unfortified towns, so long as, unless you can actually take them, your campaign is not advanced? At present the circumstances are very different. The modern economic organization of nations amounts very nearly to a *leveé en masse*. From 1914 to 1918 the whole German people were at war and the whole French people were at war as well, the English people were at war, and for a year and a half the whole American people were at war. Therefore, it is very difficult any longer to sustain the merciful principle that you must not, for instance, bombard defenseless towns. They were bombarded by all parties in the war; if there be another war,—which God forbid, though we are not at all sure God will forbid it!—is it not perfectly clear that every enemy town that can be reached by an airplane will be bombarded? There will be no sparing of women and children and of noncombatants.

Take the treatment of the wounded. Under the old surgery, if a man received a gunshot wound, he was put out of the game continuously or for a long period of time. A similar wound now means only that in a few weeks he will return to the colors. When you attack trenches you cannot leave enemies behind, sound or wounded. Everybody knows that wounded men in the World War were killed by thousands, by all the armies. What is going to prevent it? What is international law to do when an infuriated country is determined to win an unjust cause by any means? You can't stop them. You can only do what we tried to do during the war,—to make cruel enemies a subject of animadversion. We can tell the world that our enemies do not play fair, that they deal very harshly with the people whose country they occupy. If the Germans had landed in America, we would have been treated exactly as the Belgians were treated. That is the way the Germans make war. But how sure are we that it is not the way in which the United States will make war in the future? If we are going to rebuild international law, we must recognize these terrific underlying difficulties.

So with reference to war on the seas. I have the great misfortune in this learned assembly not to be an international lawyer. My interests have been very largely in international intercourse, in the development of diplomacy between nations. I do not pretend to a deep knowledge of the principles of international law, so difficult, so obscure, and so important. But I can see, and anybody without a knowledge of international law can see, that the United States has taken a very different position with regard to the freedom of the seas from what it occupied before the war. Even after

the beginning of the war, when American vessels were interfered with, under circumstances which according to precedent were entirely contrary to our interests and practices, the United States feebly protested. Those ships were retained. There is, of course, a suggestion that we are to demand from Great Britain an indemnity for such detention. We may secure such an indemnity, but we cannot secure it without accepting the principle that a great naval nation may, in making a general war, attack the commerce of neutrals—not simply of its adversaries, but of neutrals, because of naval necessity.

The United States has gone far toward the position of the powerfully armed nations whose interest it is to destroy the commerce of their adversaries during war. I am a heretic on that subject, for I never had any belief in the immunity of private property at sea. It seems to me by war on merchant shipping you do your enemy the maximum amount of harm with the smallest loss of life in comparison with military operations. However that may be, it is a fact that the United States is no longer in a position to stand,—no longer has the desire to stand,—for the old idea of the solid, impregnable freedom of the seas to neutrals in time of war. Why not admit the change of front?

Again, and this is the last observation that I wish to make, we in the United States have developed an unwillingness to stand by our own international law. A great nation like ours is bound to grow out of some of its early principles. Take, for instance, the question of territory. In the late political campaign, one of the speakers, to his own hurt, suggested that there was no use bringing up the question of the six votes of Great Britain in the Assembly of the League of Nations because we also had six votes. He was obliged to explain with a great deal of difficulty a statement which was true. If we were in the League of Nations we should wield our vote and that of our five protected states.

A very curious fact is that the American people want to have subject states, but are not willing to admit that we have protectorates. What else is Panama? It is incredible that that little state should engage in war with any other country which might threaten the Panama Canal. The decision in such questions is not made in Panama, but in Washington. Everybody knows, though we refuse to admit it, that in territorial matters we have the same kind of policy as Great Britain and France and Germany. We have not the same desire to enlarge to a great degree; but it seems clear that the United States looks upon itself as a world maritime Power which must protect its approaches. We should look upon any effort to enlarge the population and the strength of the British colonies in the West Indies as not proper because the Caribbean is our preserve. If we are to inaugurate a new system of international law, to build on the ruins, if we expect to continue the great achievements of past times in this respect, we must admit that we are not in the least free from a desire to extend our territory where we think

our interest demands it. We have done so repeatedly in the last forty years, and we shall undoubtedly continue so to do.

There is an American force bigger than the American Society of International Law, bigger than Congress, bigger than the press! That is a kind of stubborn American feeling shared in by every thinking man and woman, that this is a great country; that it has a great future and must play a great part; that therefore it must protect its borders by an influence over neighboring lands which might be in a military way advantageous to us. We are beginning to feel that we must have our own water connections and naval stations; we must have a new relation to the output of the tropical raw materials which have become so important. We have been for twenty years an Asiatic Power, and there is no Asiatic Power which is not also a European Power under the present state of things.

Of course we hope that the United States will, in the course of the next decade, get on an even keel. We do not expect danger from Asia, and yet I do not see how anybody can be in Asia or out of Asia without feeling every time he wakes up in the morning that there is a real danger—three hundred and fifty million in China, three hundred million in India, one hundred million under Japanese influence! There is the great field for the diplomacy, for the international law, and perhaps for the wars of the future.

We think we can sit here quietly and discuss the results of the Peace of Versailles and the status of the League of Nations. The main argument for some league of nations is simply that there is beyond any organization an unwritten league, an understanding among nations as to trade and personal rights; a general notion as to what is the fair thing for a country to claim and to receive, which is the real and vital international law. If there be moral and intellectual force enough in the world to stand by that conception of international welfare, that general idea of combination of human interests that is larger than the interest of every country, then that idea is bound finally to be reduced to some kind of international association. If it does not, the world will go to pieces, including the American Society of International Law; and no structure of artificially composed international law can restrain that frightful danger.

President Root. The very interesting remarks of Professor Hart relate to and form an appropriate part of the discussion of the reports of the subcommittees which were presented yesterday evening. There are two subcommittees of the Committee for the Advancement of International Law which should properly take them into consideration. One is Subcommittee No. 2, "To formulate and agree upon the amendments and additions, if any, to the rules of international law shown to be necessary or useful by the events of the war and the changes in the conditions of international life and intercourse which have followed the war." The other is Subcommittee No. 4, which is charged to consider "The subjects not now ade-

quately regulated by international law, but as to which the interests of international justice require that rules of law shall be declared and accepted." Professor Hart's remarks were taken down by the stenographer, and with the permission of the Society, the Chair will direct that the stenographer furnish a copy of those remarks to each of the two subcommittees of the Committee for the Advancement of International Law for their consideration in their further reports.

Professor HART. I much appreciate the courtesy.

Dr. PAUL S. REINSCH. While I am far from having any fault to find with the very interesting observations of Professor Hart and while, in fact, I agree with him on almost every point, there was a statement at the beginning of his remarks which to my mind indicates a slight misunderstanding. He spoke as though he had observed that there had not been a desire to discuss freely and frankly every important question that might be within the field of the Society. Now, if Professor Hart was not impressed with the success of the committees in stating the problems adequately, we have to consider that we are at the beginning of a new period of work, that the committees have just been called together, that they are feeling their way—I am speaking for my committee—towards some subjects which could be made fruitful subjects of study, and that we are not yet in the position to suggest solutions. As there was yesterday a discussion of a subject which I noticed in the morning paper to have been understood by some outsiders as indicating a side-stepping of certain matters, I want to say that, as I have seen the work of this meeting from all angles, I am sure such a feeling or such a conception is mistaken, and that whatever subject the members of the Society desire to discuss or on which they desire committees to act, if it is within the purview of the Society, there will be no objection on the part of anybody. I spoke this morning with several members concerning the desirability of perhaps having a separate subcommittee on the question of international organization, or having the Committee on Organization take up that subject as a whole or assign it to the proper committee.

Therefore, I simply desire to express my feeling that the Society in every respect is entirely true to its purpose of being an absolutely free forum for the discussion without partisanship of questions of international law.

President ROOT. Is there any further business?

The Secretary asks about taking action upon Dr. Reinsch's suggestion as to a Committee on International Organization. I think that that ought to be pretty carefully considered, because there is always the danger that a Society of this kind finds itself running into politics, and the moment we run into politics we are destroyed as a society of international law.

Mr. CHARLES NOBLE GREGORY. I move that the matter be referred to the Executive Council.

Mr. CHARLES HENRY BUTLER. Let me call attention to something that happened yesterday. The Committee for the Advancement of Interna-

tional Law agreed to the appointment of a Committee on Organization, to consist of the President and the Secretary as general officers, and the four chairmen of the subcommittees. Why would it not be proper to refer Dr. Reinsch's suggestion to that Committee on Organization?

President ROOT. May the Chair inquire as to organization of what?

Mr. BUTLER. The question came up on the delimitation of the functions of the different subcommittees, and after considerable discussion a new committee of the Committee for the Advancement of International Law was formed on organization, so that the questions between the subcommittees as to which have jurisdiction could go to an appellate body, so to speak, to deal with. Now, would not the motion of Mr. Gregory be properly amended by having this question go to the Committee on the Advancement of International Law and find its place in that Committee on Organization?

Professor GEORGE G. WILSON. That committee was entitled the "Committee on Organization of Work," so as to allocate the various subjects to the various subcommittees, and this question would naturally come within that scope.

Mr. BUTLER. It is immaterial where it goes. It may wind up there eventually.

President ROOT. Mr. Gregory's motion is that the question suggested by Mr. Reinsch relating to one of the subjects for the consideration of this Society be referred for action to the Executive Council. I suppose if the Executive Council, on consideration, finds it is appropriate it should be considered by the Committee for the Advancement of International Law, it will say so, and send it to that committee.

All in favor of that motion will say "Aye"; contrary, "No." It is agreed to.

The Executive Council is to meet immediately upon the adjournment of the Society.

The Chair would again remind the members of the Society of the dinner this evening which is at 7:30 o'clock. You will have the pleasure of listening to the Secretary of State and the Prince of Monaco.

If there is no further business, the meeting is adjourned.

(Thereupon, at 11:25 o'clock, a. m., the meeting adjourned *sine die*.)

MINUTES OF THE MEETING OF THE EXECUTIVE COUNCIL

Saturday, April 30, 1921

Pursuant to adjournment on April 28th, the Executive Council of the American Society of International Law met in the Shoreham Hotel at 11:30 o'clock, a. m., on Saturday, April 30th, immediately upon the adjournment of the annual meeting of the Society. Honorable OSCAR S. STRAUS presided.

Present:

Hon. CHANDLER P. ANDERSON	Mr. GEORGE W. KIRCHWEY
Hon. SIMEON E. BALDWIN	Prof. JOHN H. LATANÉ
Mr. CHARLES HENRY BUTLER	Mr. JACKSON H. RALSTON
Mr. WILLIAM C. DENNIS	Hon. ELIHU ROOT
Mr. CHARLES NOBLE GREGORY	Mr. JAMES BROWN SCOTT
Mr. CHARLES CHENEY HYDE	Hon. OSCAR S. STRAUS

Prof. GEORGE G. WILSON

Mr. GEORGE A. FINCH, Assistant Secretary, was also in attendance.

The Council proceeded to the election of officers and committees for the ensuing year.

It was first moved and carried that the President of the Society be *ex officio* a member of the Executive Committee.

The following officers and committees were then unanimously elected, the Secretary in each case casting the single ballot of the whole Council:

Chairman of the Executive Council

Hon. OSCAR S. STRAUS.

Executive Committee

Hon. JOHN W. DAVIS	Hon. DAVID JAYNE HILL
Hon. GEORGE GRAY	Mr. JACKSON H. RALSTON
Mr. CHARLES NOBLE GREGORY	Hon. ROBERT LANSING

Prof. GEORGE G. WILSON

Ex officio: The President, Chairman of the Executive Council, Treasurer, Recording Secretary and Corresponding Secretary.

Treasurer

Hon. CHANDLER P. ANDERSON

Recording Secretary
Mr. JAMES BROWN SCOTT

Corresponding Secretary
Mr. CHARLES HENRY BUTLER

Assistant to the Secretaries
Mr. GEORGE A. FINCH

Editorial Board of the American Journal of International Law
JAMES BROWN SCOTT, *Editor-in-Chief*

CHANDLER P. ANDERSON	CHARLES CHENEY HYDE
PHILIP MARSHALL BROWN	ROBERT LANSING
CHARLES NOBLE GREGORY	JOHN BASSETT MOORE
AMOS S. HERSHEY	JESSE S. REEVES
DAVID JAYNE HILL	GEORGE G. WILSON

THEODORE S. WOOLSEY

Secretary of the Board of Editors and Business Manager
GEORGE A. FINCH

Standing Committee on Selection of Honorary Members

GEORGE G. WILSON, Chairman; JACKSON H. RALSTON, THEODORE S. WOOLSEY.

Standing Committee on Increase of Membership

OSCAR S. STRAUS, Chairman; CHARLES CHENEY HYDE, JOHN H. LATANÉ, JESSE S. REEVES, WILLIAM C. DENNIS; provided that the committee shall have power to add to its membership.

Auditing Committee

CHARLES CHENEY HYDE, CHARLES RAY DEAN.

Committee on Annual Meeting

JAMES BROWN SCOTT, Chairman; PHILIP M. BROWN, WILLIAM C. DENNIS, CHARLES NOBLE GREGORY, CHARLES CHENEY HYDE, ROBERT LANSING, BRECKINRIDGE LONG, JACKSON H. RALSTON; provided that the committee shall have power to add to its membership.

Mr. CHARLES CHENEY HYDE on behalf of the Auditing Committee, then submitted a certificate from the American Audit Company, showing that the accounts of the Society for the years 1919–1920 had been audited and found to be correct. Mr. Hyde reported that the securities of the Society had been inspected by the members of the Auditing Committee and found

to be in proper order. The report was received, approved, and directed to be placed on file.

Mr. WILLIAM C. DENNIS moved that the Council consider the appointment of a Committee on Organization to assist in dividing the labors of the four subcommittees of the Committee for the Advancement of International Law. After discussion, the motion was laid upon the table.

Whereupon, the Executive Council, at 12 o'clock noon, adjourned *sine die.*

OSCAR S. STRAUS,
Chairman.

JAMES BROWN SCOTT,
Recording Secretary.

ANNUAL BANQUET

Shoreham Hotel, Saturday evening, April 30, 1921

TOASTMASTER

THE HONORABLE ELIHU ROOT
President of the Society

SPEAKERS

DR. NICHOLAS MURRAY BUTLER
President of Columbia University in the City of New York

THE HONORABLE CHARLES EVANS HUGHES
Secretary of State of the United States

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President Root. Ladies and gentlemen, will you be good enough to fill your glasses with the best you can get while we drink to the health of the President of the United States?

The President!

It has been a rule of these dinners that they should not be prolonged beyond the limit to which an ordinary, private dinner would run. The American Society of International Law felt that there was no better place for it to begin in reforming the world than by abjuring those dreadful functions in which a lot of tired people are obliged to sit hour after hour listening to people who are making the greatest efforts of their lives, and, accordingly, we restrain ourselves and by example we restrain our guests to a period ending from ten o'clock to half past ten; and you will then be going home to your wives and husbands and children.

I was told the other day by a friend of a visit he made to a great public institution in which there was provision for the insane. He was taken to a room in which there were twenty-odd women in rocking chairs, all rocking as hard and as fast as they could—rock, rock, rock—saying nothing, doing nothing but rocking. He said: "What does this mean?"

"Well," the director said to him, "these women are all violent lunatics and this rocking enables them to work off steam and it satisfies their strong impulse to do something violent. If they were not able to do this they would be doing the most outrageous things."

Now, in the disturbed condition of international affairs, with the one hundred persons in this room, each one of whom knows perfectly well what ought to be done and what can be done for the reconstruction and regeneration of the world, a very useful thing it is to get together here and rock for a while, to restrain our dispositions towards great and violent deeds by genial good fellowship, by that magnetic influence which comes from association with others and the realization that other people have ideas too, and that perhaps we do not all have the same ideas, and that it is useful to compare, and that, after all, one of the most beneficial things for the world may be to set the example of consideration for other peoples' ideas.

Some years ago in Russia I was taken to see a very great anarchist, Prince Kropotkin, a close friend of Tolstoi's, and after Tolstoi's death the leader of all the guilds and sects of anarchists of Russia. I had a delightful afternoon with him. He was one of the most genial and philosophical fellows I ever knew.

When we were coming away the gentleman who had made the arrangements and who had taken me there, a man who bore a great name in Russia, said to me, "You are going to have a revolution in America."

I said, "Is that so? Why?" "People there make their own laws and they select the people to execute them. I don't see why they should revolt."

"Oh," he said, "you are going to have a revolution. You cannot have real freedom in America until you have destroyed two things."

I said, "That is very interesting. Pray, tell me what they are."

He said, "One is capital and the other is public opinion."

I have thought a great deal about that. He was a man of intelligence. He was not one of the class of men anxious to pull everything to pieces with a view to picking up the pieces for himself. He was a man of position and standing.

It seemed to me that what was really in the back of his head was that the public opinion of the community constrained by its force individual conduct and that that constraint was tyranny; that to be truly free every member of civil society should be at liberty to do just what he chose to do without any reference to the unwritten laws of society.

I am inclined to think that, without its being stated so boldly, the world

at large is pursuing that idea. One of the results of the war is an intolerance of the restraint of those rules which have grown up through the centuries for the conduct of civil society in the state, in the conduct of nations, and in the conduct of individuals. I am inclined to think that under the disruptive force of war the cement which binds the members of civil society together has been running out, that cement which consists of tradition, respect for that past upon which we found our efforts for a more glorious future, respect for the laws which embody and express the common judgment of the millions of sane and honest people who have lived through the generations and centuries, the laws which were the growth from their lives and their sense of need for order. All over the world, I believe it to be true that the great need of civilization now is a renaissance of respect for law. And when that comes you will find a decrease in the hold-ups and the exploits of Dick Turpin on our highways, and the multitude of crimes which we call a crime wave.

To one field of human thought and human struggle for effective organization this Society is devoted, and effective influence or action in that direction cannot come from individual effort alone. It must be by associated effort, and associated effort requires a consideration of others, respect for the opinions of others, a conception of liberty which is not liberty for one's self alone but a willingness to accord the same liberty to others, a conception of justice which means not getting an allowance of one's own claims but a willingness to do justice to others, and the attrition of intercourse and good fellowship and kindly feeling and personal recognition, all of which are being promoted by a thousand gatherings of various kinds all over the country. All are playing their part towards the accomplishment of the great end of the restoration of law in the world, which, when it comes, will be indeed the real, not the ephemeral or phantasmal end of war.

Priscilla said to John Alden "Why don't you speak for yourself, John?" and I feel bound to apply the rule in regard to these dinners I announced a little while ago and say "Why don't I stop speaking myself?" and, accordingly, I have the very great pleasure and honor of introducing to you as the first speaker the one whom I should select, if I were called upon to designate the man who of all the men in America, not merely by reading but by personal association, intelligent observation, and human contact was the best informed regarding the public life of Europe, Mr. Nicholas Murray Butler.

Dr. NICHOLAS MURRAY BUTLER. Mr. Chairman, Mr. Secretary, ladies and gentlemen: The very admirable remarks of the President have offered so many texts that if I were to indulge myself in a brief reflection upon each one of them this rigid rule to which he refers would be a wreck before morning. But I observe upon looking at my watch that you have no reason for alarm, because I live on daylight-saving time and have already

gone home! I think it is fortunate for you that the Secretary of State is living on standard time.

My function for a number of years in New York and Washington and elsewhere when invited to appear at gatherings or banquets of lawyers and students and practitioners of law, has been to serve as a lay figure to represent the very humble and very inconspicuous but very important client. Those whom I represent make the profession of law possible, and, therefore, we may, I think, have some claim upon your attention, however brief.

I have a notion, that the President, although I did not see him in the gallery of the Senate this afternoon, must have been at the Capitol, because he gave a most vivid description of what happened there when he spoke of a company of tired men listening to a few of their number making the efforts of their lives. Perhaps, I ought not to be too critical of those efforts, although they were lengthy, some of them, but I may say that I contributed a little to abbreviating the performance. A lady sitting next to me was very much disturbed because a critical remark made by a Senator on one side was not answered to her satisfaction by a Senator from the other side, and she said to me rather audibly "Why don't they answer that? Why doesn't somebody reply?" and I said, "Madam, please don't suggest it or I am sure they will."

What the President has been saying just now about respect for law was the topic uppermost in my own mind when I began to think what would be appropriate to say in your presence tonight, and I should like, if you will permit me, to approach that subject from a little different angle.

It is obvious that there is a decline in the respect for law, not only in our own but in other lands. This is pretty widespread and it reaches very responsible orders and classes of society. I am disposed to think, however, that it is not entirely due to a moral or ethical cause, to be found operating wholly among individuals who are manifesting somewhat less respect for law than was once traditional among our modern peoples. It is rather, I think, a phase of the very remarkable and far-reaching change that is coming over the world, which is bound to have very great consequences both for national organization, national development and national government, and for International relations and the building of organizations for the carrying on of international relations and the determination of international differences in the next generation and in the generations to come.

For centuries past the chief intellectual interest of men, so far as it has related to their relations with one another, has been as to matters of politics in the largest sense of the word. Men have been concerned with liberty with government, with law, with the building of organizations and institutions for the definition and protection of these, and trying to extend, under those formulas, what we are pleased to call modern civilization. But for thirty or forty years past there has been evidence, rapidly increasing of late, of a shifting of the center of gravity and the development of an increasing,

shall I say skepticism? as to the significance of political relationships and political institutions, as to their stability and as to their capacity for usefulness. One scheme after another has been proposed, first by way of amendment to political organizations as we know them, and now much more openly by way of substitutes for them. If you look for a name to give to that field into which the center of gravity of human interest has shifted, you will have to use the word economics.

Man's interest everywhere has moved over from debate and discussion of questions which are purely or largely political in the old sense of the word, to questions that are purely or largely economic, and that are intertwined with political questions, by reason of the historical conditions under which these problems, these economic problems and conditions, have grown up.

One effect of that has been the enormous multiplication of statutes all over the world, but particularly in this blessed land of ours, because men have found that these economic questions could best be protected, at least for the time being, by using the power and the strength of the political forces. They have gone to legislatures and to Congress and have multiplied statutes until their number is without end. The very distinguished statesman who recently sat in the Senate of the United States, for the State of Colorado, and who left that body on the 4th of March last, Senator Thomas, made a speech in the Senate towards the close of the last session of the last Congress in which, if I recall his figures aright, he stated that within a short term of years, which he named—I cannot recall the term from memory but it was a short term—seventy thousand statutes had been enacted in the United States by the several legislatures and by the Congress of the United States. It seems perfectly obvious that when the law-making power is carried to so complex, so multiplied and so minute an extent as that, it is bound to express itself in a hundred ways in the fields of economics to the disadvantage or dislike of a large class of the community, who thereupon begin to disregard it. By reason of our having carried statutes and statute-making to such an extent, we are really giving occasion and invitation to a disregard or disrespect for law or lowering the respect for law as such, although we say that the law is law, the law must be enforced. All properly enacted law rests upon the same foundation, but the fact of the matter is that the average man also looks to the content of a law as well as to its form, and he says: "This appeals to my sense of justice. This appeals to my national pride. This appeals to my law-abiding sense. This I will myself gladly obey and aid in securing the obedience of others. But this I regard as fussy; I regard this as unjust, and this, unless detected I will either flaunt or at least neglect."

The fact of the matter is that in trying to solve these many hundreds of economic questions, small questions, most of them, we have brought about a situation which nobody contemplated and which nobody planned, which actually invites disrespect for law. In other words, the law, so far as it is

statute law, has had a tendency to overstep proper limits of its useful application.

We are finding out that no matter what our traditional definitions may be, what our text-book explanations may be, it does not follow that a law is a law because it is a statute. It does not even follow that a constitutional provision is a law. Professor Duguit, the distinguished French scholar who has been in our country this winter, has been delivering most illuminating lectures upon this point, and has been calling the attention of students and teachers and lawyers and members of the bar to the relation that exists between effective law and the public opinion which underlies it.

Now, Mr. Chairman, the only point which I wish to make, the application which suggests itself to me of this particular aspect of our great problem, is that as we go forward in the field of international relations, we are certainly going to be confronted by this same dilemma. The dilemma is so obvious, is of such every-day occurrence in the daily life of the municipality, of the state or of the nation, that it is going to reproduce itself in one form or another as we begin to build the new international structure of tomorrow based upon the extension of the rule of law, based upon the judicial determination of international differences so far as they are justiciable.

The task is a two-fold one. The task is first, if you please, that upon which this association, its friends, its correspondents, its colleagues in other lands are all engaged, the task of formulating and drawing the plans for the building of the new international judicial institutions. And then there is the other enormously important aspect of the matter, which is the preparation of public opinion, the education of public opinion for the understanding, for the support, and for the carrying forward of that scheme.

Few things could be more unfortunate and few things more fraught with disaster in the next hundred years than to build, and endeavor to use, a structure which the public opinion of the world would not support. We can only move so fast in our ideals, or rather in the application of our ideals, as we can prepare the supporting force of public opinion to sustain. That is a hard lesson to learn. It sometimes seems cruel that we should not be able to move ahead more rapidly in the great affairs and great undertakings of men, but it is human nature that stands in the way if, in the attempt to construct a series of international institutions, however excellent in ground plan or in theory, we proceed so fast and so far that the foundation is lacking, the great foundation of instructed and convinced public opinion. Then we shall come to grief and we shall array public opinion for a generation in antagonism, not in support, of the very thing which we wish to bring about.

These economic questions, these economic problems, to which I have referred, are just as insistent in the field of international relations,—more so perhaps,—than they are in the field of our national organization.

What are the matters that are at this very moment attracting the attention of the nations of the world as they are trying to cooperate more closely

and to build their new institutions so as to avoid future international war? What are they? Are they not almost without exception economic? Are we not confronted by the primary problem of the development of the great economic resources of the world, those things by means of which men live, by means of which men trade, by means of which men manufacture and build great systems of transportation on land, on sea or in the air? What are the problems that confronted the peace conference in Paris? What were their difficulties and embarrassments as they tried to give effect to the spirit of nationality seeking to express itself in new communities or in the reconstruction or reconstitution of old communities in Central, in Eastern and in Southern Europe?

Everywhere and always it was the question of economic existence of a modern state. Jugo-Slavia gets a port on the Adriatic. Czecho-Slovakia gets the right of transportation to ports on the Baltic. Poland goes to a Baltic port. What about Austria? What about Hungary? What about a population in any state confined within a territory strictly delimited without much regard to the economic resources of the community, unable to feed itself in one case, unable in another case to warm itself, and unable in the third case to build its shelter, without international relations, without international trade, without free access to economic resources that are placed under another sovereignty?

These, ladies and gentlemen, are the problems of tomorrow. Here is to be found the content of that to which our new international organization and our new international judicial systems, when they come, will give form; but the content is going to be economic.

Let us have care that in going into this enormously important field, the field of tomorrow, that we take into it for our guidance and our warning the experience and the knowledge we have gained from studying the history of the development of modern nations. Take the historical geography of Europe or the historical geography of North America, and satisfy yourself in a few moment's reading as to what has been the lure, the urge, that has moved the boundary from this imaginary line to this river, to this mountain chain, to this ocean, and find out where are the minerals, where are the ports, where are the fertile fields, where are the rivers for transportation. Those arteries and nerves are the veins of a nation's life, and we are going to have precisely that problem presented to us in the next generation in building a system of international organization about a respect for law, about an extension of the rule of law, about cooperation with other like-minded peoples to bring into effect this great, splendid American dream, this American ideal and this American policy that has been our glory almost from the foundation of our Republic.

The analogy is close. The opportunity to learn from the one and to apply it to the other is abundant. Statesmen of tomorrow must understand how the center of gravity has shifted from politics to economics, how

it has been attempted to use the political form to deal with the economic content, and what are the lessons of America, of France, of Italy, of Germany, of England, of Japan and the rest, for the project upon which we are so earnestly anxious to engage.

President ROOT. In these troublous times of anxiety and solicitude there is one man to whose restraint and wisdom and moral quality above all others, next to the President, this great people turn, to whom this people is looking now with hope and with prayer that his hands may be held up, that he may be strong and successful in his efforts for us, for all of us. Long knowledge of him as a leader of the bar, as a jurist, as the Chief Executive, of the greatest American State, as a great and noble leader of public opinion, has given to me not only sincere friendship for him, but a calm and cheerful confidence in what he will be able to achieve.

It is with the greatest of pleasure I present to you The Honorable The Secretary of State, Mr. Charles Evans Hughes.

The Honorable CHARLES EVANS HUGHES. Mr. President and Members of the Society of International Law, ladies and gentlemen: As Mr. Choate said on a historic occasion, I rise with my side bleeding from the spur of the moment.

The President has seen fit to speak with commiseration of those already sadly fatigued who listen to after-dinner speakers who attempt to make the greatest efforts of their lives. I bespeak pity for the tired speaker who addresses the public with an inordinate appetite for speeches.

I have no allusions about my particular work. What I had on the 4th of March I have since lost. I am reminded of what one of the most eminent members of the Supreme Court once said to me as he surveyed an enormous pile of records which had been brought by his messenger to his desk. Said he: "I could do this job a great deal better if they would only give me a little time to think."

I speak with trepidation before this brilliant company, this saving remnant, representing what I am constrained to believe is what remains of international law.

The words of your President so generously spoken have touched me very deeply. Where we are toiling, he has toiled. Where we are striving, he has achieved. Where we are putting forth our greatest endeavors, he has attained the highest distinction and success. He has pointed the pathway to the stars, and while we follow haltingly with unequal step I confess to you that it is his example in which I find and always will find courage and inspiration.

You doubtless all have in mind, or in the language of one of my judicial friends, you are certainly "charged with notice" of what Mr. Hall said about thirty years ago in a preface to an edition of his great work on Inter-

national Law,—that very remarkable prophecy with respect to the next great war, the unscrupulous manner in which it would probably be waged, the fact that national existences would be at stake, that whole nations would be in the field, that the commerce of the world might be on the sea to destroy or to save, that it would be a hard test, and probably that test would not be met to the satisfaction of those who maintain the standards of the law. I think he added that while the next war would probably be a great war and would be waged without scruple because of the great strain in striving for success, after that great war there would be a return to the law and an increased stringency of the law.

I feel that the spiritual gains of the war have been very few and disappointing. I doubt very much whether we are returning, at least, with any discernible speed, to the standards of the law. I think it peculiarly a time when we must put little faith in forms of expressions and take counsel of our conscience. It is easy to develop institutions which are in truth but forms of expression, but it is in the ideal of justice, safeguarded by the self-restraint of individual or nation that the hope of the world alone lies. It is only as we consider men and nations and events and are able to detect the restraints of conscience that we are able to find any sort of assurance for a return of law.

We may have abundance of that which is law according to the Austinian standards of edicts backed by force of commands sanctioned by the power of conquerors. We may hear much in this generation of the demand for the observance of law that rests upon power and only upon power as its sanction, but when shall we see ushered in the reign of law that reflects the standards of the enlightened conscience of the world, content to demand only what is justly due, ready to contribute all that ought to be given, and seeking constantly for right and justice in that arbiter of nations, as well as of the deeds of men, the human heart?

My great difficulty in speaking to you tonight is that my head is full of what I ought not to say. At the same time I may say that it is a great satisfaction to me as I approach the tasks of the Department of State, to realize how in meeting the serious problems that we must now confront from day to day the interest of the people of the United States seems so clearly to coincide with the interests of humanity.

We have had, even in the past few weeks, opportunity in a very practical way to indicate the support that this Government is ready to give to a judicial determination, or an arbitral award fairly, honestly, conscientiously arrived at in dealing with the difficulties of our sister republic. We have constantly occasion to remark that what the United States desires under the urge of the economic pressure, to which Dr. Butler has referred, is simply the equal chance and the fair opportunity from which none should be excluded. We do not ask for ourselves that which we are unwilling to accord to others. And at this time, when as a result of the war so many

new regions are coming under a control with novel incidents, it is not simply in the interest of the United States that we speak, but in the true interest of every nation, when we urge that these great powers that are confided to those enjoying mandates shall be exercised for the common benefit of all or in such way as not to exclude by any monopolistic control the fair opportunities of honest endeavor. It is a proud thing, a thing of which we may be very justly proud, that one can say that you cannot look to any part of the earth and find the United States seeking something for its own aggrandizement at the expense of any other nation.

So it is an especial satisfaction in the daily endeavor that we are able to believe that these endeavors advance us somewhat toward the common goal, and when we are speaking of our own interests as we do speak of them, as we must speak of them, as we propose unflinchingly to advocate them, they are interests that are rooted in the demand for justice and fair play at a time when force and hatred and ill-will and suspicion are rife in the world.

Mr. President, I said a moment ago that this was a saving remnant. That was not a jest. It is with those who keep the torch of reason lighted that the security of the country lies. I count it a great privilege to be a member of this Society, and I welcome, in these difficult conditions when advice and counsel and careful thought are so urgently needed, your cooperation, so that as I am permitted to speak as counsel for the United States in these difficult undertakings, I may be assured that we shall work together for the lasting prosperity of our country and also to advance the cause of justice among the peoples of the earth.

President ROOT. Ladies and Gentlemen, it is with great regret that the managers of the banquet have been informed that illness, which I hope will not prove to be too serious, prevents the attendance of His Serene Highness, the Prince of Monaco, at the banquet as he had intended. I am sure I speak the sincere feeling of all the members of this assemblage in hoping him speedy and complete recovery from his present indisposition, for we join heartily in the universal respect and admiration for him as a man and as a great scientist, and in the universal expression of good will on the part of the American people toward him.

The hour of half-past ten having arrived, I now declare this assemblage adjourned.

NOTE

The List of Members of the Society was corrected up to March 1, 1921, and printed in the Proceedings for 1920. But few changes in the membership have occurred within the intervening three months, and the list is therefore not reprinted in this volume.

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